THE GENERAL STATUTES O NORTH CAROLINA

1969 CUMULATIVE SUPPLEMENT

Completely Annotated, under the Supervision of the Department of Justice, by the Editorial Staff of the Publishers

UNDER THE DIRECTION OF
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Volume 2A

Place in Pocket of Corresponding 1966 Replacement Volume of Main Set and Discard Previous Supplement

THE MICHIE COMPANY, LAW PUBLISHERS
CHARLOTTESVILLE, VA.
1969

Preface

This Cumulative Supplement to Replacement Volume 2A contains the general laws of a permanent nature enacted at the 1966, 1967 and 1969 Sessions of the General Assembly, which are within the scope of such volume, and brings to date the annotations included therein.

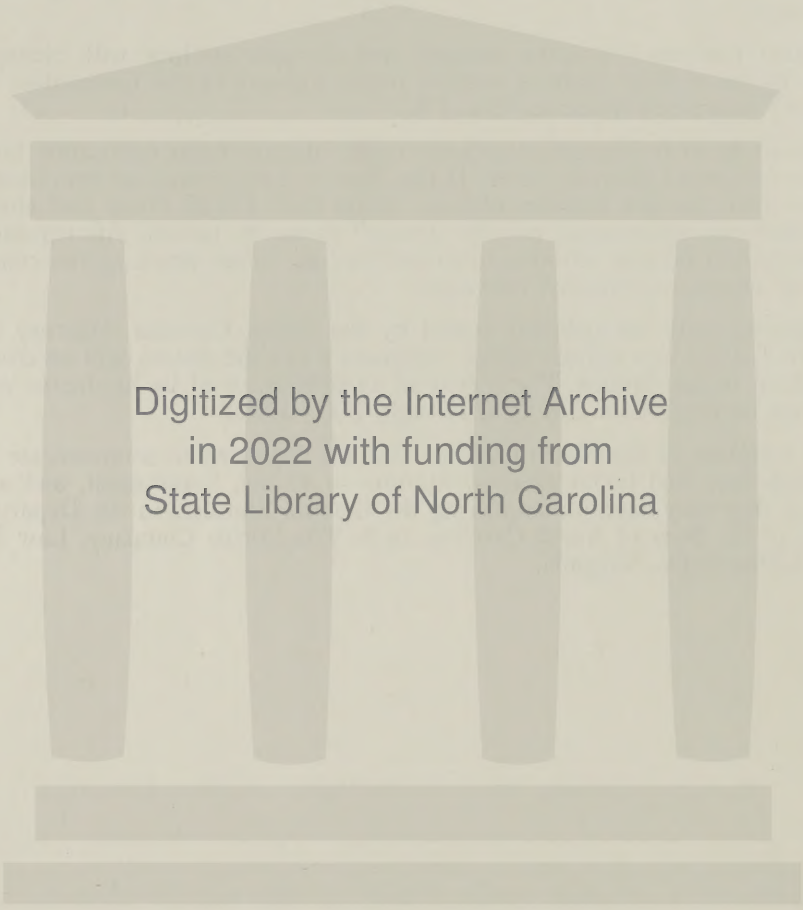
Amendments of former laws are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings. Editors' notes point out many of the changes effected by the amendatory acts.

Chapter analyses show new sections and also old sections with changed captions. An index to all statutes codified herein appears in the Cumulative Supplement to Replacement Volumes 4B and 4C.

A majority of the Session Laws are made effective upon ratification but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after thirty days after the adjournment of the session" in which passed. All legislation appearing herein became effective upon ratification, unless noted to the contrary in an editor's note or an effective date note.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement, and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.



Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1967 and 1969 Sessions of the General Assembly affecting Chapters through 52A of the General Statutes.

Annotations:

Sources of the annotations:

North Carolina Reports volumes 265 (p. 217)-275 (p. 341).
North Carolina Court of Appeals Reports volumes 1-5 (p. 227).
Federal Reporter 2nd Series volumes 347 (p. 321)-410 (p. 448).
Federal Supplement volumes 242 (p. 513)-298 (p. 1200).
United States Reports volumes 381 (p. 532)-394 (p. 575).
Supreme Court Reporter volumes 86-89 (p. 2151).
North Carolina Law Review volumes 43 (p. 667)-47 (p. 731).
Wake Forest Intramural Law Review volumes 2-5.

The General Statutes of North Carolina
1969 Cumulative Supplement

VOLUME 2A

Chapter 28.
Administration.

Article 1.

Probate Jurisdiction.

§ 28-1. Clerk of superior court has probate jurisdiction.

Probate May Not Be Denied on Ground Involving Construction.—The clerk has no right to exclude any part of a will from probate on any ground which involves the construction of the will where testamentary intent is disclosed. Ravenel v. Shipman, 271 N.C. 193, 155 S.E.2d 484 (1967).

Clerk May Vacate Order, etc.—Since the clerk of the superior court of each county has original and exclusive jurisdiction of proceedings to probate a will, he is the tribunal to which a motion is properly made to set aside the probate of a purported will—or part thereof—for any inherent and fatal defect appearing upon the face of the instrument. Ravenel v. Shipman, 271 N.C. 193, 155 S.E.2d 484 (1967).

Direct Attack.—The validity of the appointment of an administrator may not be collaterally attacked in an action against such administrator, but may be directly attacked by any person in interest, including an administratrix of the decedent appointed in another state, by motion before the clerk of the superior court who made the appointment to vacate and set aside the letters of administration theretofore issued by such clerk. King v. Snyder, 269 N.C. 148, 152 S.E.2d 92 (1967).

Administrator Defending Wrongful Death Action Estopped to Deny Validity of Appointment.—An administrator appointed in this State who undertakes to defend an action for wrongful death by moving to set aside a default judgment and filing answer is thereafter estopped to deny the validity of his own appointment, and the court correctly denies his motion to dismiss the action for lack of jurisdiction of his person or the estate. The validity of his appointment is not before the court, and it is error for the court to find facts in regard thereto. King v. Snyder, 269 N.C. 148, 152 S.E.2d 92 (1967).

(1)

Applied in King v. Snyder, 269 N.C. 148, 152 S.E.2d 92 (1967).

(3)

The term "assets," as used in this subdivision, includes intangibles. In re Edmundson, 273 N.C. 92, 159 S.E.2d 509 (1968).

(4)

The term "assets," as used in this subdivision, includes intangibles. In re Edmundson, 273 N.C. 92, 159 S.E.2d 509 (1968).

A policy of automobile liability insurance issued in the name of the deceased by an insurer qualified to do business in this State or otherwise subject to service of process is an asset within the purview of subdivision (4) so as to support the appointment of an ancillary administrator. In re Edmundson, 273 N.C. 92, 159 S.E.2d 509 (1968).

Applied in King v. Snyder, 269 N.C. 148, 152 S.E.2d 92 (1967).

§ 28-2. Exclusive in clerk who first gains jurisdiction.

Quoted in King v. Snyder, 269 N.C. 148, 152 S.E.2d 92 (1967).

ARTICLE 3.

Right to Administer.

§ 28-6. Order in which persons entitled; nomination by person renouncing right to administer.

(1)

Cited in In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

§ 28-8. Disqualifications enumerated.

Opinions of Attorney General.—Honorable Edgar W. Tanner, Rutherford County Clerk of Superior Court, 10/13/69.

ARTICLE 6.

Collectors.

§ 28-25. Appointment of collectors.—When, for any reason other than a situation provided for in chapter 28A entitled "Estates of Missing Persons," a delay is necessarily produced in the admission of a will to probate, or in granting letters testamentary, letters of administration, or letters of administration with the will annexed, the clerk may issue to some discreet person or persons, at his option, letters of collection, authorizing the collection and preservation of the property of the decedent. (R. C., c. 46, s. 9; C. C. P., s. 463; 1868-9, c. 113, s. 115; Code, s. 1383; Rev., s. 22; C. S., s. 24; 1924, c. 43; 1965, c. 815, s. 2; 1967, c. 24, s. 14.)

Editor's Note.—

The 1967 amendment, originally effective Oct. 1, 1967, substituted "admission" for "administration" near the beginning of the section. Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

ARTICLE 7.

Appointment and Revocation.

§ 28-32. Letters revoked on application of surviving husband or widow or next of kin, or for disqualification or default.

Clerk Has Primary, etc.—

The clerk of superior court, as probate judge, has exclusive original jurisdiction to hear and decide a motion to remove an administrator for cause. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

Manner in Which Facts to Be Ascertained.—In authorizing the clerk to remove executors and administrators for cause, this section does not specifically direct the manner in which the facts shall be ascertained, but it plainly implies that he shall act promptly and summarily, and, pending any litigation in that respect, he has power to make all necessary and interlocutory orders for the protection of the estate. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

A proceeding to remove an executor or administrator is neither a civil action nor a special proceeding. Therefore, § 1-276, which provides that "whenever a civil ac-

tion or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction" has no application to probate matters. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Superior Court May Review Findings of Fact Challenged by Specific Exceptions.—To say that the superior court has jurisdiction to hear a probate matter only upon an appeal from a final judgment entered below does not mean that the judge can review the record only to ascertain whether there have been errors of law. He also reviews any findings of fact which the appellant has properly challenged by specific exceptions. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Jurisdiction of Superior Court Is Derivative.—It is sometimes said that, upon an appeal from an order of the clerk made in the performance of his duties as judge of probate, the jurisdiction of the judge of the superior court is derivative. Such derivative jurisdiction is construed to mean, inter alia (1) that the clerk of the superior court has the sole power in the first instance to determine whether a decedent died testate or intestate, and, if he died testate, whether the paper writing offered for probate is his will; (2) that proceedings to repeal letters of administration must be commenced before the clerk who issued them in the first instance; and (3) that the judge of the superior court has no jurisdiction to appoint or remove an administrator or a guardian. In other words, jurisdiction in probate matters cannot be exercised by the judge of the superior court except upon appeal. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Hearing De Novo.—Where the clerk removes an administratrix upon his finding that she was not the widow of the deceased and therefore was not entitled to appointment as a matter of right, and an appeal is taken to the superior court from such order, the superior court, even though its jurisdiction is derivative, hears the matter de novo, and may review the finding of the clerk provided the appellant has properly challenged the finding by specific exception, and may hear evidence and even submit the controverted fact to the jury; but where there is no exception to the finding, the superior court may determine only whether the finding is supported by competent evidence, and if the order is so supported the superior court is without authority to vacate the clerk's judgment and order a jury trial upon the issue. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Res Judicata.—An adjudication by the clerk that the administratrix theretofore appointed by him was not the widow of decedent is not res judicata in any other proceeding between the parties which respondent may be entitled to pursue. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Article 8.

Bonds.

§ 28-34. Bond; approval; condition; penalty. — Every executor from whom a bond is required by law, and every administrator and collector, before letters are issued, must give a bond payable to the State, with two or more sufficient sureties, to be justified before and approved by the clerk, conditioned that such executor, administrator or collector shall faithfully execute the trust reposed in him and obey all lawful orders of the clerk or other court touching the administration of the estate committed to him. Where such bond is executed by personal sureties, the penalty of such bond must be, at least, double the value of all the personal property of the deceased, but where such bond shall be executed by a duly authorized surety company, the penalty in such bond may be fixed at not less than one and one-fourth times the value of all the personal property of the deceased. Notwithstanding the provisions of the preceding sentence, the clerk of the superior court may, when the value of the assets to be administered by the personal representative exceeds $100,000.00, accept bond in an amount equal to the value of the assets plus ten percent (10%) thereof. The value of said personal property shall be ascertained by the clerk by examination, on oath, of the applicant or of some other competent person. If the personal property of any decedent is insufficient to pay his debts and the charges of administration, and it becomes necessary for his executor or administrator to apply for the sale of real estate for assets, and the bond previously given is not double the value of both

the real and personal estate of the deceased, such executor (if bond is required of him by law) or administrator shall, before or at the time of filing his petition for such sale, give another bond payable and conditioned as the one above prescribed and with like security, in double the value of the real estate for the sale of which application is made, provided, however, that where such bond shall be executed by a duly authorized surety company, the penalty of said bond need not exceed one and one-fourth times the value of said real estate.

No provision in this chapter shall be construed as requiring a bond of an administrator appointed solely for the purpose of bringing an action for the wrongful death of the deceased; such administrator shall be exempt from the requirements of a bond until such time as he shall receive property into the estate of the deceased. (C. C. P., s. 468; 1879-1, c. 93; Code, s. 1388; Rev., s. 319; C. S., s. 33; 1935, c. 386; 1949, c. 971; 1967, c. 41, s. 1.)

Editor's Note.—

The 1967 amendment added the second paragraph. Section 2 of the amendatory act provides: "All laws and clauses of laws in conflict with this act are hereby repealed, except that such laws shall continue in force and effect with respect to bonds obtained by administrators prior to the effective date of this act." The act was ratified March 14, 1967, and became effective on ratification.

Opinions of Attorney General.—Honorable Robert Miller, Clerk, Superior Court, Stokes County, 9/18/69.

§ 28-39.1. Conveyances by foreign executors validated.—If any nonresident executor, or administrator, c.t.a., acting under a power of sale contained in the last will and testament of a citizen and resident of another state or foreign country, executed according to the laws of this State and duly proven and recorded in the state or foreign country wherein the testator and his family and said executor, or administrator c.t.a., resided, and now or hereafter recorded in this State, shall have sold and conveyed real estate situated in this State prior to May 1, 1969, then said sale and conveyance so had and made shall be as valid and sufficient in law as though such executor, or administrator c.t.a., had given bond or obtained letters of administration in this State prior to the execution of such deed. (1945, c. 652; 1957, c. 320; 1969, c. 1067, ss. 1, 2.)

Editor's Note. — The 1969 amendment inserted "or administrator c.t.a." in three places in the section and changed the date near the middle of the section from Jan. 1, 1957, to May 1, 1969. Session Laws 1969, c. 1067, s. 3, provides: "This act does not apply to or affect pending litigation."

§ 28-40. Oath and bond required before letters issue.—Before letters testamentary, letters of administration with the will annexed, letters of administration or letters of collection are issued to any person, he must give the bond required by law and must take and subscribe an oath or affirmation before the clerk, or before any other officer of any state or country authorized by the laws of North Carolina to administer oaths, that he will faithfully and honestly discharge the duties of his trust, which oath must be filed in the office of the clerk.

No provision in this chapter shall be construed as requiring a bond of an administrator appointed solely for the purpose of bringing an action for the wrongful death of the deceased; such administrator shall be exempt from the requirements of a bond until such time as he shall receive property into the estate of the deceased. (C. C. P., ss. 467, 468; 1870-1, c. 93; Code, ss. 1387, 1388, 2169; Rev., s. 29; C. S., s. 39; 1923, c. 56; 1967, c. 41, s. 1.)

Editor's Note.—

The 1967 amendment added the second paragraph. Section 2 of the amendatory act provides: "All laws and clauses of laws in conflict with this act are hereby repealed, except that such laws shall continue in force and effect with respect to bonds obtained by administrators prior to the effective date of this act." The act was ratified March 14, 1967, and became effective on ratification.

Article 10.

Inventory.

§ 28-53. Trustees in wills to qualify and file inventories and accounts.

Opinions of Attorney General.—Honorable Glenn L. Hammer, Clerk of Superior Court, Davie County, 8/15/69.

Cited in Fulk & Needham, Inc. v. United States, 288 F. Supp. 39 (M.D.N.C. 1968).

Article 11.

Assets.

§ 28-68. Payment to clerk of money owed intestate.

Local Modification.—Union: 1959, c. 663.

Article 14.

Sales of Real Property.

§ 28-83. Conveyance of lands by heirs within two years voidable; conditions for valid conveyance; judicial sale for partition.

Editor's Note.—
For note on the problem of after-discovered wills, see 47 N.C.L. Rev. 723 (1969).

Cited in In re Estate of Nixon, 2 N.C. App. 422, 163 S.E.2d 274 (1968).

Article 15.

Proof and Payment of Debts of Decedent.

§ 28-105. Order of payment of debts.

Second class. Funeral expenses to the extent of six hundred dollars ($600.00). This limitation shall not include cemetery lot or gravestone. The preferential limitation herein granted shall be construed to be only a limit with respect to preference of payment and shall not be construed to be a limitation on reasonable funeral expenses which may be incurred; nor shall the preferential limitation of payment in the amount of six hundred dollars ($600.00) be diminished by any Veterans Administration, social security or other federal governmental benefits awarded to the estate of the deceased or to his or her beneficiaries.

(1967, c. 1066.)

Editor's Note.—
The 1967 amendment added the last sentence in this paragraph.

As only the provision as to second class debts was affected by the amendment, the rest of the section is not set out.

Opinions of Attorney General.—Mr. Rom B. Parker, Halifax County Attorney, 8/27/69.

§ 28-107.1. Funeral expenses of decedent.—Funeral expenses of a decedent shall be considered as a debt of the estate of the decedent and the decedent's estate shall be primarily liable therefor. The provisions of this section shall not affect the application of G.S. 28-105. (1969, c. 610, s. 1.)

Editor's Note.—Session Laws 1969, c. 610, s. 2, provides that "this act shall not change the application of previous laws or clauses of laws as to the estate of persons dying before ratification of this act." The act was ratified May 27, 1969, and made effective on ratification.

ARTICLE 16.

Accounts and Accounting.

§ 28-147. Suits for accounting at term.

Applied in Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

ARTICLE 17.

Distribution.

§ 28-152. Distribution to nonresident trustee only upon appointment of process agent.

—(a) No assets of the estate of a deceased person subject to administration in this State shall be delivered or transferred to a trustee of a testamentary trust or an inter vivos trust who is a nonresident of this State who has not appointed an agent for the service of civil process for actions or proceedings arising out of the administration of the trust with regard to such property.

(b) If property is delivered or transferred to a trustee in violation of this section, process may be served outside this State or by publication, as provided by the rules of civil procedure, and the courts of this State shall have the same jurisdiction over the trustee as might have been obtained by service upon a properly appointed process agent. The provisions of this section with regard to jurisdiction shall be in addition to other means of obtaining jurisdiction permissible under the laws of this State. (1967, c. 947.)

Editor's Note. — The act inserting this section is effective Oct. 1, 1967.

§ 28-158.1. Distribution of assets in kind in satisfaction of bequests and transfers in trust for surviving spouse.

Editor's Note.—

For article on "Statutory Reaction to Revenue Procedure 64-19," see 46 N.C.L. Rev. 531 (1968).

ARTICLE 19.

Actions by and against Representative.

§ 28-172. Action survives to and against representative.

The decedent's personal representative is the proper party plaintiff in a wrongful death action. Brendle v. General Tire & Rubber Co., 408 F.2d 116 (4th Cir. 1969).

Wrongful death damages are unlimited. Brendle v. General Tire & Rubber Co., 408 F.2d 116 (4th Cir. 1969).

There is a surviving cause of action for predeath expenses and pain and suffering. Brendle v. General Tire & Rubber Co., 408 F.2d 116 (4th Cir. 1969).

The right of a ward to sue his guardian for lack of diligence in the care of the estate survives to the ward's administrator. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

§ 28-173. Death by wrongful act; recovery not assets; dying declarations.

I. IN GENERAL.

Editor's Note.—

For note on parent-child tort immunity, see 44 N.C.L. Rev. 1169 (1966).

Stetson v. Easterling, 274 N.C. 152, cited in the note below, was commented on in 47 N.C.L. Rev. 280, 282 (1968).

Section Creates New Cause, etc.—

The wrongful death statute confers a new right of action which did not exist before the statute and which at the death of an injured person accrued to the personal representative of the decedent for the benefit of a specific class of beneficiaries. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

The right of action for wrongful death, etc.—

In accord with 2nd paragraph in original. See Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

Actions for wrongful death are creatures of the statute. Reeves v. Hill, 272 N.C. 352, 158 S.E.2d 529 (1968).

The right of action for wrongful death exists only by virtue of this section, which defines the right of action, and § 28-174, which defines the basis on which damages may be recovered. Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968).

No Such Right Existed, etc.—
At common law there was no right of action for wrongful death. Such right of action exists only by virtue of this section. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

This section contemplates only one cause of action, and when the action is brought by the personal representative, the judgment is conclusive on other persons, and the right given by the statute is exhausted. Kendrick v. Cain, 272 N.C. 719, 159 S.E.2d 33 (1968).

What Constitutes, etc.—
In accord with 2nd paragraph in original. See Harris v. Wright, 268 N.C. 654, 151 S.E.2d 563 (1966).

Negligence alone, without "pecuniary injury resulting from such death," does not create a cause of action under this section. Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

Wrongful death damages are unlimited. Brendle v. General Tire & Rubber Co., 408 F.2d 116 (4th Cir. 1969).

There is a surviving cause of action for predeath expenses and pain and suffering. Brendle v. General Tire & Rubber Co., 408 F.2d 116 (4th Cir. 1969).

The right of action for wrongful death is limited to such as would, if the injured party had lived, have entitled him to an action for damages therefor. Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968).

This section controls over the provisions of the Workmen's Compensation Act, § 97-1 et seq. Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

No Conflict with § 97-10.2 (f) (1) (c).— There is no conflict in the language in this section which prohibits use of the wrongful death recovery to pay a debt of the decedent and the language in § 97-10.2 (f) (1) (c) which directs that a portion of the recovery be applied to the reimbursement of the employer for benefits paid under award of the Industrial Commission. Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

A covenant not to sue, procured by one tort-feasor, does not release the other from liability. Kendrick v. Cain, 272 N.C. 719, 159 S.E.2d 33 (1968).

But a release of one joint tort-feasor ordinarily releases them all. Kendrick v. Cain, 272 N.C. 719, 159 S.E.2d 33 (1968).

Recovery of Burial Expenses.—
There is no provision that the recovery must be applied to burial expenses. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

Funeral expenses do not constitute an element of damages to be taken into consideration in a wrongful death action. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

A cause of action does not exist for the recovery of burial expenses in an action for wrongful death separate and apart from the right to recover for the wrongful death. The statute provides for the payment of burial expenses out of the amount recovered in such action. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

Nonsuit.—
Nonsuit held proper in action for wrongful death resulting when intestate drove into the side of a train which had been standing at nighttime, blocking the crossing, for some 30 seconds prior to the injury, with its ground lights, its platform light, and cab lights burning. Morris v. Winston-Salem Southbound Ry., 265 N.C. 537, 144 S.E.2d 598 (1965).

The burden of proving actionable negligence in an action for damages for wrongful death grounded in negligence is, of course, on the party seeking recovery. But if the evidence, that offered by both plaintiff and defendant, construed in the light most favorable to the party with the burden of proof, is sufficient to make out a prima facie case of actionable negligence, a motion for nonsuit should be denied and the case submitted to the jury. Maynor v. Townsend, 2 N.C. App. 19, 162 S.E.2d 677 (1968).

Applied in Burton v. Groghan, 265 N.C. 392, 144 S.E.2d 147 (1965); Greene v. Nichols, 274 N.C. 18, 161 S.E.2d 521 (1968), commented on in 47 N.C.L. Rev. 281, 282 (1968).

II. LIMITATION OF THE ACTION.

Action Is Now Subject, etc.—
The period prescribed for the commencement of an action for wrongful death under this section is two years. High v. Broadnax, 271 N.C. 313, 156 S.E.2d 282 (1967).

And Time Is No Longer, etc.—
Section 1-53 and this section were amended in 1951 so as to remove from the latter section the provision previously contained therein fixing the period of time in

which an action for damages for wrongful death must be instituted and so as to make such action subject to the two-year statute of limitations set forth in § 1-53. The effect of the amendment was to make the time limitation a statute of limitations and no longer a condition precedent to the right to bring and maintain the action. Kinlaw v. Norfolk So. Ry., 269 N.C. 110, 152 S.E.2d 329 (1967).

Action by Ancillary Administrator.—The fact that an action for wrongful death is brought by an ancillary administrator appointed in this State does not constitute the action one accruing to a resident of this State within the meaning of the proviso to § 1-21. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

III. PARTIES TO THE ACTION.

Suit Must Be Brought, etc.—The only party who may maintain an action under this section for the wife's wrongful death is the executor, administrator, or collector of the decedent. First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

The right of action conferred by this section vests in the personal representative of the deceased. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

The statutory action for wrongful death vests in the personal representative of the deceased. Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968).

The decedent's personal representative is the proper party plaintiff in a wrongful death action. Brendle v. General Tire & Rubber Co., 408 F.2d 116 (4th Cir. 1969).

The real party in interest, etc.—Although an action for wrongful death must be brought by the personal representative of the deceased, the personal representative is not the real party in interest and the action does not accrue in his favor. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

Personal Representative Has Authority and Responsibility.—The personal representative who institutes a wrongful death action is not a mere figurehead or naked trustee but has authority as well as responsibility. First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

Action by Child Born Alive.—Since the child must carry the burden of infirmity that results from another's tortious act, it is only natural justice that it, if born alive, be allowed to maintain an action on the ground of actionable negligence. Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968).

Viable Child Born Dead.—Under this section there can be no right of action for the wrongful prenatal death of a viable child en ventre sa mère. Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968).

Where the Supreme Court based its decision on the ground there can be no evidence from which to infer "pecuniary injury resulting from" the wrongful prenatal death of a viable child en ventre sa mère, since it is all sheer speculation, it is not necessary to decide the debatable question as to whether a viable child en ventre sa mère, who is born dead, is a person within the meaning of the Wrongful Death Act. Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

Action by Administrator of Child, etc.—In accord with 2nd paragraph in original. See First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

The right of action for wrongful death is limited to such as would, if the injured party had lived, have entitled him to an action for damages therefor. Hence, the administrator of an unemancipated child whose death is caused by the negligence of his parent has no cause of action against the parent for the wrongful death of the child because such child, if he had lived, would have had no cause of action against the parent on account of his injuries. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Action by Representative of Parent against Child.—Neither a parent nor his personal representative has an action for wrongful death against an unemancipated child or his representative. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Action by Administrator of Wife, etc.—If a wife's death is caused by the actionable negligence of her husband, this section creates and authorizes an action by her personal representative to recover for her wrongful death. First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

IV. DISTRIBUTION OF RECOVERY.

Existence of Beneficiaries Immaterial.—Recovery, if negligence is proved, is by the decedent's personal representative and is not conditioned upon the decedent's leaving dependents or beneficiaries of his estate. Abernethy v. Utica Mut. Ins. Co., 373 F.2d 565 (4th Cir. 1967).

There is no exception or provision in this section to the effect the personal representative's right to maintain an action depends in any way on the identity of the particular persons who, under the Intestate Succession Act, would be entitled to the recovery. First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

A certain liability is imposed for death, and that liability is exclusive. No other responsibility is left which springs from the occurrence upon which liability rests—death—and the effect of the compensation as a satisfaction of all other claims is in no way limited or impaired by the circumstances of the identity of the persons to whom it is paid or because in a given case no one survives to take advantage of the statute. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Evidence of the decedent's dependents or beneficiaries is irrelevant and inadmissible. Abernethy v. Utica Mut. Ins. Co., 373 F.2d 565 (4th Cir. 1967).

The Supreme Court recognizes two different causes of action stemming from the same wrongful act. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

Where a person is injured and later dies as a result of the negligence of another, his administrator has two causes of action, namely, (1) a cause of action to recover, as general assets of the estate, damages on account of the decedent's pain and suffering and on account of his hospital and medical expenses, and (2) a cause of action to recover, for the benefit of his next of kin, damages on account of the pecuniary loss resulting from his death. Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968).

The right of an injured person to sue for personal injuries of any kind is entirely separate and distinct from the right of the personal representative to sue under authority of the wrongful death statute. Any damage sustained by such person during his lifetime is personal to that person and, if proximately caused by the wrongful act of another, could be recovered by him. If this right of action survived his death, the recovery would be an asset of his estate to be administered as any other personal property owned and possessed by decedent at the time of his death. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

While both the right of action for the recovery of consequential damages sustained between date of injury and date of death, and the right of action to recover damages resulting from such death, have as basis the same wrongful act, there is no overlapping of amounts recoverable. But such consequential damages as flow from the wrongful act would be recoverable by the personal representative; those sustained by the injured party during his lifetime, for benefit of his estate, and those resulting from his death, for benefit of his next of kin, determinable upon separate issues. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

And Two Separate Recovery Funds.—The Supreme Court specifically recognizes two separate causes of action growing out of the same wrongful act of the tort-feasor and two separate recovery funds. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

"The wrongful death fund" results from the wrongful death cause of action. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

And "the general estate fund" results from the personal injury cause of action. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

Payment to Doctors and Hospital in Excess of $500.—The treatment for injuries during the interval between injury and death over and beyond the $500 provided for in this section, is to be paid to the doctors and hospital from the general estate fund. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

The Supreme Court recognizes the right of creditors (the doctors and hospital) to recover more than the wrongful death statute authorized (i.e., more than the $500) by recovering from the funds of the other cause of action. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

Burial Expenses for Minor Child.—In a case of an unemancipated minor child the father, who is primarily liable for the burial expenses of such child, would not be able to recover such expenses from the wrongful death funds. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

The father of an unemancipated minor child whose death results from the negligent act of a third party has a cause of action against the third party for the reasonable and necessary funeral expenses and loss of services during the minority of the deceased child which is separate and apart from the cause of action by the personal representative for the wrongful death of the child. Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969).

§ 28-174. Damages recoverable for death by wrongful act; evidence of damages.—(a) Damages recoverable for death by wrongful act include:

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;
(2) Compensation for pain and suffering of the decedent;
(3) The reasonable funeral expenses of the decedent;
(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:
   a. Net income of the decedent,
   b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,
   c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;
(5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;
(6) Nominal damages when the jury so finds.

(b) All evidence which reasonably tends to establish any of the elements of damages included in subsection (a), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act. (R. C., c. 1, s. 10; 1868-9, c. 113, s. 71; Code, s. 1499; Rev., s. 60; C. S., s. 161; 1969, c. 215, s. 1.)

Editor's Note.—

The 1969 amendment rewrote this section. Section 3 of the amendatory act provides that the act shall not apply to litigation pending on its effective date, April 14, 1969.

The cases cited in the note below were decided prior to the 1969 amendment.

For comment on wrongful death damages in North Carolina, see 44 N.C.L. Rev. 402 (1966).

For case law survey as to damages, see 44 N.C.L. Rev. 993 (1966).

Stetson v. Easterling, 274 N.C. 152, cited in the note below, was commented on in 47 N.C.L. Rev. 280 (1968).

Greene v. Nichols, 274 N.C. 18, cited in the note below, was commented on in 47 N.C.L. Rev. 281 (1968).

Damages may not be assessed on the basis of sheer speculation, devoid of factual substantiation. Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968).

But Jury May Base Speculation on Facts.—Damages in any wrongful death action are to some extent uncertain and speculative. A jury may indulge in speculation in assessing damages where it is necessary and there are sufficient facts to support speculation. Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

Negligence Alone Does Not Create Cause of Action.—Negligence alone, without pecuniary injury resulting from such death, does not create a cause of action. Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968).

Recovery to Be One Compensation in Lump Sum. — This section contemplates that if plaintiff be entitled to recover at all, he is entitled to recover as damages one compensation in a lump sum. He is not entitled to recover the whole sum from each of the joint tort-feasors. Kendrick v. Cain, 272 N.C. 719, 159 S.E.2d 33 (1968).

The burden of proof, etc.—

The burden is on plaintiff to prove that the estate of his intestate suffered a net pecuniary loss as a result of her death. Greene v. Nichols, 274 N.C. 18, 161 S.E.2d 521 (1968); Maynor v. Townsend, 2 N.C. App. 19, 162 S.E.2d 677 (1968).

Direct evidence of earnings is not essential, it being sufficient to present evidence of "health, age, industry, means and business." Maynor v. Townsend, 2 N.C. App. 19, 162 S.E.2d 677 (1968).

It is not essential that direct evidence of the earnings of a deceased adult be offered in order for there to be recovery of

damages. Evidence of his health, age, industry, means and business are competent to show pecuniary loss. Reeves v. Hill, 272 N.C. 352, 158 S.E.2d 529 (1968).

Although it is not essential that direct, specific evidence be offered with reference to decedent's earning capacity, it is required that plaintiff offer some evidence tending to show that intestate was potentially capable of earning money in excess of that which would be required for her support. Greene v. Nichols, 274 N.C. 18, 161 S.E.2d 521 (1968).

It is required that plaintiff offer some evidence tending to show that intestate was potentially capable of earning money in excess of that which would be required for her support. Maynor v. Townsend, 2 N.C. App. 19, 162 S.E.2d 677 (1968).

Wrongful Death of Child.—

The measure of damages for the death of a child is the same as for an adult, notwithstanding the difficulty of applying the rule is greatly increased in the case of an infant. Burton v. Croghan, 265 N.C. 392, 144 S.E.2d 147 (1965).

Viable Child Born Dead.—There can be no evidence from which to infer pecuniary injury resulting from the wrongful prenatal death of a viable child en ventre sa mere; it is all sheer speculation. Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968).

§ 28-175. Actions which do not survive.

Action against Guardian for Lack of Diligence.—An action brought by the administrator of a ward's estate against the guardian to recover money lost because of lack of diligence by the guardian is not one for relief which could not be enjoyed, or the granting of which would be nugatory after death, so as to fall within the class specified in subdivision (3) of this section. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

Article 20.

Representative's Powers, Duties and Liabilities.

§ 28-184.1. Exercise of powers of joint personal representatives by one or more than one.

Opinions of Attorney General.—Honorable George M. Harris, Caswell County Clerk of Superior Court, 9/12/69.

Chapter 28A.

Estates of Missing Persons.

§ 28A-1. Death not presumed from seven years' absence; exposure to peril to be considered.

Editor's Note.—For article on estates of missing persons in North Carolina, see 44 N.C.L. Rev. 275 (1966).

Chapter 29.

Intestate Succession.

Article 1.

General Provisions.

§ 29-1. Short title.

Wrongful Death Beneficiaries Determined as of Time of Death.—The persons who, under the Intestate Succession Act, are entitled to the recovery in a wrongful death action are to be determined as of the time of the decedent's death. First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

Cited in Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

§ 29-5. Computation of next of kin.

Applied in In re Will of Cobb, 271 N.C. 307, 156 S.E.2d 285 (1967).

§ 29-10. Renunciation.

Cited in Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

ARTICLE 2.

Shares of Persons Who Take Upon Intestacy.

§ 29-13. Descent and distribution upon intestacy.

The power of the legislature to determine who shall take the property of a person dying subsequent to the effective date of a legislative act cannot be doubted. Johnson v. Blackwelder, 267 N.C. 209, 148 S.E.2d 30 (1966).

Law at Time of Death Governs.—It is well settled that an estate must be distributed among heirs and distributees according to the law as it exists at the time of the death of the ancestor. Johnson v. Blackwelder, 267 N.C. 209, 148 S.E.2d 30 (1966).

Even Though Decedent Became Incompetent to Make Will Before Law Changed.—Where it was alleged that an intestate became mentally incapable of making a will prior to ratification of the Intestate Succession Act on June 10, 1959, and that such mental incapacity continued until his death, and it was contended that the intestate's personal estate should be distributed in accordance with the Intestate Succession Law as it existed on June 9, 1959, it was held that this contention assumes: Before he became mentally incapable of making a will, the intestate had knowledge of and was pleased with the statutes of descent and distribution; if he had made a will, he would have disposed of his estate as provided by the statutes then in effect; he would have been displeased with the provisions of the 1959 act; and, but for his mental incapacity, would have made a will disposing of his estate as provided by the statutes in effect prior to ratification of the 1959 act. Such successive assumptions underlying the contention are unwarranted. They relate to matters that lie wholly within the realm of speculation. The intestate had no vested right in the statutes of descent and distribution in effect prior to the ratification of the 1959 act. He was charged with knowledge that these statutes were subject to change by the General Assembly. Johnson v. Blackwelder, 267 N.C. 209, 148 S.E.2d 30 (1966).

The determinative fact is that the intestate made no will. Hence, his estate "shall descend and be distributed" in accordance with the statutes in effect on the date of his death, namely, this chapter. Johnson v. Blackwelder, 267 N.C. 209, 148 S.E.2d 30 (1966).

§ 29-14. Share of surviving spouse.

This section defines, etc.—

In accord with original. See Peoples Oil Co. v. Richardson, 271 N.C. 696, 157 S.E.2d 369 (1967).

Present Right of Possession Not Conferred.—A wife is not a real party in interest so as to interpose as a defense or counterclaim, in an action in ejectment instituted by her husband's grantee, that her husband had fraudulently conveyed the lands without her joinder in order to deprive her of the possession thereof, since this section, defining the share of the surviving spouse of an intestate, and § 29-30, providing for a life estate at the election of the surviving spouse, do not give her a present right of possession. Peoples Oil Co. v. Richardson, 271 N.C. 696, 157 S.E.2d 369 (1967).

Share of Second or Successive Spouse.—Section 30-3 (b), which provides that a second or successive spouse who dissents from the will of his deceased spouse shall take only one half the amount provided by the Intestate Succession Act for the surviving spouse if the testator has surviving him lineal descendants by a former marriage but there are no surviving lineal descendants by the second or successive marriage, is not arbitrarily discriminatory and capricious so as to be violative of the due process provisions of the federal and State Constitutions. Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969).

No Lineal Descendants.—There being no lineal descendants, under this section the surviving widow is entitled to "all the net estate" of an intestate. Johnson v. Blackwelder, 267 N.C. 209, 148 S.E.2d 30 (1966).

Cited in Swain v. Tillet, 269 N.C. 46, 152 S.E.2d 297 (1967).

Article 6.

Illegitimate Children.

§ 29-19. Succession by illegitimate children.

Editor's Note.—For note on illegitimacy in North Carolina, see 46 N.C.L. Rev. 813 (1968).

Article 8.

Election to Take Life Interest in Lieu of Intestate Share.

§ 29-30. Election of surviving spouse to take life interest in lieu of intestate share provided.

Section Preserves, etc.—

This section has the practical effect of providing the benefits of dower to the surviving spouse, at her election. Peoples Oil Co. v. Richardson, 271 N.C. 696, 157 S.E.2d 369 (1967).

Present Right of Possession Not Conferred.—A wife is not a real party in interest so as to interpose as a defense or counterclaim in an action in ejectment instituted by her husband's grantee that her husband had fraudulently conveyed the lands without her joinder in order to deprive her of the possession thereof, since § 29-14, defining the share of the surviving spouse of an intestate, and this section, providing for a life estate at the election of the surviving spouse, do not give her a present right of possession. Peoples Oil Co. v. Richardson, 271 N.C. 696, 157 S.E.2d 369 (1967).

Inchoate Right to Dower May Be Protected by Redemption from Tax Sale.—A wife who claims in property an inchoate right to dower is possessed of such an interest that she clearly has the right to protect such interest by redeeming such property from a tax sale. Samet v. United States, 242 F. Supp. 214 (M.D.N.C. 1965).

Cited in McLeod v. McLeod, 266 N.C. 144, 146 S.E.2d 65 (1966).

Chapter 30.

Surviving Spouses.

Article 1.

Dissent from Will.

§ 30-1. Right of dissent.

Article Was Unconstitutional, etc.—

This section and §§ 30-2 and 30-3, insofar as they gave a husband the right in certain instances to dissent from his deceased wife's will and take a specified share of her estate were unconstitutional under former N.C. Const., Art. X, § 6, to the extent that they diminished pro tanto a devise of her separate estate in accordance with a will executed by her. Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967).

But Husband's Right to Dissent Has Been Restored by Constitutional Amendment.—The effect of the adoption by the voters of the amendment to N.C. Const., Art. X, § 6, was to restore, subject to the qualifications set forth in Session Laws 1963, c. 1209, the right of the husband to dissent from the will of his wife. Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967).

Where, at the time of his wife's death in 1965, the amendment to N.C. Const., Art. X, § 6, authorizing the legislature to empower a husband to dissent from his wife's will had been certified but the legislation reenacting this section and §§ 30-2, and 30-3 had not become effective, the husband had a right to dissent from his wife's will based on anticipatory provisions of Session Laws 1963, c. 1209, which directed the submission of the constitutional amendment, and which provided that the word "spouse" should apply to both husband and wife in certain statutes. Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967).

And Husband and Wife Have Same Rights.—Session Laws 1963, c. 1209 was enacted to abrogate the effect of the decision in Dudley v. Staton, 257 N.C. 572, 126 S.E.2d 590 (1962), and to make the rights of husbands and wives the same in each other's separate property. Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967).

Right of Dissent Conferred by Statute. —The right of a husband or wife to dissent from the will of his spouse is conferred by statute and may be exercised at the time and in the manner fixed by statute. Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969).

Testator Presumed, etc.—

In accord with original. See Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969).

Cited in O'Neil v. O'Neil, 271 N.C. 106, 155 S.E.2d 495 (1967).

§ 30-2. Time and manner of dissent.

The guardian of an incompetent widower is authorized to file a dissent by him from his wife's will. Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967).

Cited in Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969); Vinson v. Chappell, 3 N.C. App. 348, 164 S.E.2d 631 (1968).

§ 30-3. Effect of dissent.

Constitutionality.—Subsection (b) of this section does not create a classification or distinction that is arbitrary and unjustifiable so as to be offensive to our federal or State Constitutions. Vinson v. Chappell, 3 N.C. App. 348, 164 S.E.2d 631 (1968).

Subsection (b) of this section, which provides that a second or successive spouse who dissents from the will of his deceased spouse shall take only one half the amount provided by the Intestate Succession Act for the surviving spouse if the testator has surviving him lineal descendants by a former marriage but there are no surviving lineal descendants by the second or successive marriage, is not arbitrarily discriminatory and capricious so as to be violative of the due process provisions of the federal and State Constitutions. Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969).

Legislative Intent. — The intent of the legislature in enacting subsection (b) of this section was to enable a person who has a child or lineal descendant by a former marriage to make greater provision for such child or lineal descendant. Vinson v. Chappell, 275 N.C, 234, 166 S.E.2d 686 (1969).

This section has no application in cases of intestacy. Vinson v. Chappell, 3 N.C. App. 348, 164 S.E.2d 631 (1968).

It is only when a spouse dies testate that this section may become applicable. Vinson v. Chappell, 3 N.C. App. 348, 164 S.E.2d 631 (1968).

What Section Provides in Substance.— This section provides in substance that whenever a second or successive spouse dissents from the will of his or her deceased spouse, he or she shall take one half of the amount provided by the Intestate Succession Act for the surviving spouse if the testator has surviving him a lineal descendant by a former marriage but there is no surviving lineal descendant by the second or successive marriage. Vinson v. Chappell, 3 N.C. App. 348, 164 S.E.2d 631 (1968).

The real effect of this section is to allow a spouse, who leaves a child or other lineal descendant by a previous marriage but none by the spouse who survives him, more testamentary freedom than he would have otherwise. It is not for the Court of Appeals to "second guess" the General Assembly on the wisdom of this distinction, but the court believes the statute was enacted in good faith and it creates a classification based upon real distinctions which are not unreasonable. Vinson v. Chappell, 3 N.C. App. 348, 164 S.E.2d 631 (1968).

Subsection (b) applies to limit the share of a surviving spouse to one half the intestate share only when (1) a married person dies testate survived by his spouse, (2) the surviving spouse, being entitled under § 30-1 to do so, dissents, (3) the surviving spouse is a "second or successive spouse," (4) no lineal descendants by the second or successive marriage survive the testator, and (5) the testator is survived by lineal descendants by his former marriage. Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969).

ARTICLE 4.

Year's Allowance.

Part 1. Nature of Allowance.

§ 30-15. When spouse entitled to allowance.—Every surviving spouse of an intestate or of a testator, whether or not he has dissented from the will, shall, unless he has forfeited his right thereto as provided by law, be entitled, out

of the personal property of the deceased spouse, to an allowance of the value of two thousand dollars ($2,000.00) for his support for one year after the death of the deceased spouse. Such allowance shall be exempt from any lien, by judgment or execution, acquired against the property of the deceased spouse, and shall, in cases of testacy, be charged against the share of the surviving spouse. (1868-9, c. 93, s. 81; 1871-2, c. 193, s. 44; 1880, c. 42; Code, s. 2116; 1889, c. 499, s 2; Rev., s. 3091; C. S., s. 4108; 1953, c. 913, s. 1; 1961, c. 316, s. 1; c. 749, s. 1; 1969, c. 14.)

Editor's Note.—
The 1969 amendment, effective July 1, 1969, increased the amount of the allowance from $1,000 to $2,000. The amendatory act is applicable only to estates of persons dying on or after July 1, 1969.

Opinions of Attorney General.—Honorable Fred Proffitt, Clerk of Superior Court, Yancey County, 10/6/69.

§ **30-17. When children entitled to an allowance.** — Whenever any parent dies leaving any child under the age of eighteen years, including an adopted child, or a child with whom the widow may be pregnant at the death of her husband, or any other person under the age of eighteen years residing with the deceased parent at the time of the death to whom the deceased parent or the surviving parent stood in loco parentis, every such child shall be entitled, besides its share of the estate of such deceased parent, to an allowance of six hundred dollars ($600.00) for its support for the year next ensuing the death of such parent, less, however, the value of any articles consumed by said child since the death of said parent. Such allowance shall be exempt from any lien, by judgment or execution against the property of such parent. The personal representative of the deceased parent, within one year after the parent's death, shall assign to every such child the allowance herein provided for; but if there is no personal representative or if he fails or refuses to act within ten days after written request by a guardian or next friend on behalf of such child, the allowance may be assigned by a justice of the peace, upon application of said guardian or next friend.

If the child resides with the widow of the deceased parent at the time such allowance is paid, the allowance shall be paid to said widow for the benefit of said child. If the child resides with its surviving parent who is other than the widow of the deceased parent, such allowance shall be paid to said surviving parent for the use and benefit of such child. Provided, however, the allowance shall not be available to an illegitimate child of a deceased father, unless such deceased father shall have recognized the paternity of such illegitimate child by deed, will or other paper-writing. If the child does not reside with a parent when the allowance is paid, it shall be paid to its general guardian, if any, and if none, to the clerk of the superior court who shall receive and disburse same for the benefit of such child. (1889, c. 496; Rev., s. 3094; C. S., s. 4111; 1939, c. 396; 1953, c. 913, s. 2; 1961, c. 316, s. 2; c. 749, s. 3; 1969, c. 269.)

Editor's Note.—
The 1969 amendment substituted "six hundred dollars ($600.00)" for "three hundred dollars ($300.00)" near the end of the first sentence. The amendatory act provides that it shall be applicable only with respect to estates of persons dying on or after April 22, 1969.

Chapter 31.

Wills.

Article 2.
Revocation of Will.

ARTICLE 1.

Execution of Will.

§ 31-1. Who may make will.—Any person of sound mind, and 18 years of age or over, may make a will. (1811, c. 280; R. C., c. 119, s. 2; Code, s. 2137; Rev., s. 3111; C. S., s. 4128; 1953, c. 1098, s. 1; 1965, c. 303; 1969, c. 39.)

Editor's Note.—
The 1969 amendment, effective July 1, 1969, deleted "and 21 years of age or over, or married and of sound mind" preceding "and 18 years."

§ 31-3.3. Attested written will.

Editor's Note.—
For comment on the necessity for proof of due execution of a will, see 3 Wake Forest Intra. L. Rev. 12 (1967).

Cited in In re Will of Cobb, 271 N.C. 307, 156 S.E.2d 285 (1967).

§ 31-3.4. Holographic will.

Editor's Note.—
For note on the problem of after-discovered wills, see 47 N.C.L. Rev. 723 (1969).

Opinions of Attorney General.—Honorable Robert Miller, Clerk, Superior Court, Stokes County, 9/18/69.

ARTICLE 2.

Revocation of Will.

§ 31-5.1. Revocation of written will.

Quoted in In re Will of Burton, 267 N.C. 729, 148 S.E.2d 862 (1966).

§ 31-5.3. Will not revoked by marriage; dissent from will made prior to marriage.—A will is not revoked by a subsequent marriage of the maker; and the surviving spouse may dissent from such will made prior to the marriage in the same manner, upon the same conditions, and to the same extent, as a surviving spouse may dissent from a will made subsequent to marriage. (1844, c. 88, s. 10; R. C., c. 119, s. 23; Code, s. 2177; Rev., s. 3116; C. S., s. 4134; 1947, c. 110; 1953, c. 1098, s. 5; 1967, c. 128.)

Editor's Note.—
The 1967 amendment rewrote this section, which formerly provided that a will was revoked by the subsequent marriage of the maker, subject to certain exceptions. The amendatory act is applicable only to wills of persons dying on or after Oct. 1, 1967.

§ 31-5.7. Specific provisions for revocation exclusive; effect of changes in circumstances.

Mental Incompetency Does Not Revoke Will. — The fact that a testator became mentally incompetent to manage his business affairs or to understand the extent of his holdings, even if the mental condition continued to his death, would not revoke his will in whole or in part. Abbott v. Abbott, 269 N.C. 579, 153 S.E.2d 39 (1967).

Article 5.

Probate of Will.

§ 31-12. Executor may apply for probate; jurisdiction when clerk interested party.

Editor's Note.—
For note on the problem of after-discovered wills, see 47 N.C.L. Rev. 723 (1969).

§ 31-15. Clerk may compel production of will.

Editor's Note.—For note on the problem of after-discovered wills, see 47 N.C.L. Rev. 723 (1969).

§ 31-17. Proof and examination in writing.

Editor's Note. — For comment on the necessity for proof of due execution of a will, see 3 Wake Forest Intra. L. Rev. 12 (1967).

§ 31-18.1. Manner of probate of attested written will.

Editor's Note.—
For comment on the necessity for proof of due execution of a will, see 3 Wake Forest Intra. L. Rev. 12 (1969).

Cited in Jones v. Warren, 274 N.C. 166, 161 S.E.2d 467 (1968).

§ 31-18.2. Manner of probate of holographic will.

Cited in Jones v. Warren, 274 N.C. 166, 161 S.E.2d 467 (1968).

§ 31-18.3. Maner of probate of nuncupative will.

Editor's Note.—
For note on the problem of after-discovered wills, see 47 N.C.L. Rev. 723 (1969).

§ 31-19. Probate conclusive until vacated; substitution of consolidated bank as executor or trustee under will.

This section is restricted, etc.—
In accord with original. See Jones v. Warren, 274 N.C. 166, 161 S.E.2d 467 (1968).

Conclusively Valid, etc.—
In accord with 3rd paragraph in original. See Johnson v. Stevenson, 269 N.C. 200, 152 S.E.2d 214 (1967).

Once a paper-writing has been probated as a will, every part of its stands until set aside by the appropriate tribunal. Ravenel v. Shipman, 271 N.C. 193, 155 S.E.2d 484 (1967).

Cannot Be Attacked Collaterally.—
Under this section, a will probated and recorded in accordance with the applicable statute may not be collaterally attacked. Jones v. Warren, 274 N.C. 166, 161 S.E.2d 467 (1968).

Same—Even for Fraud.—
The probate of a will in common form is conclusive as to the validity of the instrument until set aside in a caveat proceeding duly instituted, and while the beneficiaries under the will may be held trustees ex maleficio for extrinsic fraud which interferes with the right to caveat the instrument, the probate may not be collaterally attacked for intrinsic fraud constituting grounds for attack of the instrument by caveat proceedings when there is nothing to show that plaintiff's right to attack by caveat was interfered with in any manner. Johnson v. Stevenson, 269 N.C. 200, 152 S.E.2d 214 (1967).

Same—Muniment of Title.—
Under this section a will probated and recorded in accordance with the applicable statute constitutes a muniment of title. Jones v. Warren, 274 N.C. 176, 161 S.E.2d 467 (1968).

Clerk May Revoke Probate.—Where the clerk of the superior court has probated as a will a document which has not been executed in accordance with the statutory requirements for probate or which shows on its face that it was not intended as a testamentary disposition of the author's property, or when other jurisdictional requirements for probate are shown to be lacking, the clerk may revoke his probate. Ravenel v. Shipman, 271 N.C. 193, 155 S.E.2d 484 (1967).

§ 31-24. Probate when witnesses are nonresident; examination before notary public.—Where one or more of the subscribing witnesses to the will of a testator, resident in this State, reside in another state, or in another county in this State than the one in which the will is being probated, the examination of such witnesses may be had, taken and subscribed in the form of an affidavit, before a notary public residing in the county and state in which the witnesses reside or the clerk of superior court thereof; and the affidavits, so taken and subscribed, shall be transmitted by the notary public or clerk of superior court, under his hand and official seal, to the clerk of the court before whom the will has been filed for probate. If such affidavits are, upon examination by the clerk, found to establish the facts necessary to be established before the clerk to authorize the probate of the will if the witnesses had appeared before him personally, then it shall be the duty of the clerk to order the will to probate, and record the will with the same effect as if the subscribing witnesses had appeared before him in person and been examined under oath. (1917, c. 183; C. S., s. 4149; 1933, c. 114; 1957, c. 587, ss. 1, 1A.)

Editor's Note.—
This section is set out to correct a typographical error in the original.

ARTICLE 6.

Caveat to Will.

§ 31-32. When and by whom caveat filed.

Editor's Note.—
For note on the problem of after-discovered wills, see 47 N.C.L. Rev. 723 (1969).

But when a caveat is filed, etc.—
In accord with original. See In re Will of Burton, 267 N.C. 729, 148 S.E.2d 862 (1966).

Probate in Common Form, etc.—
When a will is probated in solemn form it cannot be caveated a second time unless or until the verdict and judgment probating the will in solemn form is set aside upon a motion in the original cause; therefore, the will, if it was first probated in common form, still stands as the last will and testament until declared void in a direct proceeding in the nature of a caveat. In re Will of Burton, 267 N.C. 729, 148 S.E.2d 862 (1966).

The attack upon a will, etc.—
In accord with 1st paragraph in original. See Johnson v. Stevenson, 269 N.C. 200, 152 S.E.2d 214 (1967).

Thus, Another Purported Will, etc.—
In accord with original. See In re Will of Burton, 267 N.C. 729, 148 S.E.2d 862 (1966).

Direct Attack by Caveat Held Adequate Remedy.—Where the grounds on which plaintiff sought to establish a constructive trust in property disposed of by her parents' will were equally available as grounds for direct attack on the will by caveat, this right of direct attack by caveat gave plaintiff a full and complete remedy at law, and she was not entitled to equitable relief. Johnson v. Stevenson, 269 N.C. 200, 152 S.E.2d 214 (1967).

Beneficiaries under Alleged, etc.—
Beneficiaries under a prior paper writing are persons interested within the purview of this section and are entitled to file a caveat to a subsequent instrument probated in common form, notwithstanding they are not heirs of the deceased and are not named as beneficiaries in the writing they seek to nullify. Sigmund Sternberger Foundation v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968).

ARTICLE 7.

Construction of Will.

§ 31-39. Probate necessary to pass title; recordation in county where land lies; rights of innocent purchasers.

Editor's Note.—For note on the problem of after-discovered wills, see 47 N.C.L. Rev. 723 (1969).

Applied in Jones v. Warren, 274 N.C. 166, 161 S.E.2d 467 (1968).

§ 31-42. Failure of devises and legacies by lapse or otherwise.

Legislative Intent. — The legislature did not intend that the issue of a devisee or legatee meeting the conditions of subsection (a) could be substituted for that devisee or legatee as to a specific devise or bequest and not allowed to be similarly substituted if the same devisee or legatee were named as one of the residuary devisees or legatees. Bear v. Bear, 3 N.C. App. 498, 165 S.E.2d 518 (1969).

Construction.—Subsection (a) of this section is designed and intended to prevent the lapse of a devise or bequest, whether it be specific or residuary, in a situation where the devisee or legatee, who would have taken had he survived the testator, predeceases testator survived by issue who survive the testator and who would have been heirs of testator had there been no will. If this situation does not exist, then the devise or legacy lapses and passes under the provisions of subsection (c) (1) under the residuary or by intestacy, if there be no residuary. If lapse of a residuary devise or legacy cannot be prevented by application of subsection (a), then under subsection (c) (2) it continues a part of the residue and passes to the other residuary legatees or devisees, if any. If none, it passes as if testator had died intestate with respect thereto. That this construction manifests the intent of the legislature is further evidenced by the clear language of the statute itself. Subsection (c) (2) is applicable, with respect to residuary devises or legacies, only where subsecton (a) is not applicable. It would follow, that if the legislature had intended to exclude residuary devises and legacies from the operation of subsection (a), it would have specifically limited the section to specific legacies and devises, omitted subdivision (2) from the provisions of subsection (c), and treated residuary devises and legacies in a separate provision of the statute unrelated to any other section. Bear v. Bear, 3 N.C. App. 498, 165 S.E.2d 518 (1969).

This section is applicable to wills of persons dying on or after 1 July 1965. Bear v. Bear, 3 N.C. App. 498, 165 S.E.2d 518 (1969).

Prior to the 1965 amendment, in a situation where testator gave the residue of his estate to A, B, and C and A predeceased testator leaving no issue entitled to the property under the anti-lapse statute, A's share would pass to the heirs of testator as intestate property. After the 1965 amendment the application thereof would result in A's share continuing as a part of the residue for division among the other residuary legatees and devisees. Bear v. Bear, 3 N.C. App. 498, 165 S.E.2d 518 (1969).

Subsection (a) applies to residuary devises or bequests. Bear v. Bear, 3 N.C. App. 498, 165 S.E.2d 518 (1969).

"Residuary Devisee".—Residuary devisee is defined as the person named in a will, who is to take all the real property remaining over and above the other devises. Bear v. Bear, 3 N.C. App. 498, 165 S.E.2d 518 (1969).

"Residuary Legatee".—Residuary legatee is defined as the person to whom a testator bequeaths the residue of his personal estate, after the payment of such other legacies as are specifically mentioned in the will. Bear v. Bear, 3 N.C. App. 498, 165 S.E.2d 518 (1969).

"The Other Residuary Devisees or Legatees, If Any".—This section, by use of the words "the other residuary devisees or legatees, if any," refers to those residuary devisees or legatees named in the will and not to "such issue of the devisee or legatee as survive testator" who may have been substituted under subsection (a) of this section. Bear v. Bear, 3 N.C. App. 498, 165 S.E.2d 518 (1969).

Applicability of Subsection (c) (2).— Subsection (c) (2) of this section is applicable only where there are other residuary devisees or legatees named in the will who survive the testator. Bear v. Bear, 3 N.C. App. 498, 165 S.E.2d 518 1969).

§ 31-43. General gift by will an execution of power of appointment.

Purpose of Section.—It has been suggested that this section was passed to guard against the inadvertence of a life tenant with a general power of appointment. Accustomed throughout his life to treating the land as if it were his in fee, he might overlook making a specific appointment of the particular property and attempt to dispose of it by a general devise. In such event, if he owned other property which would pass under the devise, the power remained unexecuted and his devisees lost the property by his default. Wachovia Bank & Trust Co. v. Hunt, 267 N.C. 173, 148 S.E.2d 41 (1966).

This section is identical with § 27 of the English Wills Act of 1837 (7 Wm. IV & 1 Vict. ch. 26). Wachovia Bank & Trust Co. v. Hunt, 267 N.C. 173, 148 S.E.2d 41 (1966).

Which Is Held Applicable Only to General Powers.—Construing the Wills Act of 1837, the English courts have held that § 27, which is identical with this section, is applicable only to general powers of appointment. Wachovia Bank & Trust Co. v. Hunt, 267 N.C. 173, 148 S.E.2d 41 (1966).

As Is This Section.—The effect of this section is that a general devise or bequest shall be construed to include any real or personal property which the testator may have power to appoint in any manner he may think proper and shall operate as an execution of such power unless a contrary intention appears in the will. A power to appoint in any manner the donee may think proper is a power upon which no restrictions are imposed—a general power. This section thus applies only to general powers of appointment. Wachovia Bank & Trust Co. v. Hunt, 267 N.C. 173, 148 S.E.2d 41 (1966).

The case of Johnston v. Knight, 117 N.C. 122, 23 S.E. 92 (1895), merely applied the rule that where the donee of a power, general or special, clearly manifests an intention to execute it, effect will be given to his intent. It did not extend the applications of this section to special powers. Wachovia Bank & Trust Co. v. Hunt, 267 N.C. 173, 148 S.E.2d 41 (1966).

Hence, Special Power Is Not Executed by General Devise Not Showing Such Intent.—A general devise by a testator to his wife cannot be construed to include trust property over which he had a special or limited power of appointment, where his will discloses no intent to execute the power, since this section applies only to general powers. Wachovia Bank & Trust Co. v. Hunt, 267 N.C. 173, 148 S.E.2d 41 (1966).

Chapter 31A.

Acts Barring Property Rights.

ARTICLE 1.

Rights of Spouse.

§ 31A-1. Acts barring rights of spouse.

Right to Take under Will Not Forfeited by Abandonment.—The right of the widow to take under her husband's will that which he saw fit to bequeath or devise to her is not among the rights which this section declares forfeited by her abandonment of him. Abbott v. Abbott, 269 N.C. 579, 153 S.E.2d 39 (1967).

ARTICLE 3.

Wilful and Unlawful Killing of Decedent.

§ 31A-3. Definitions.

Applied in Tew v. Durham Life Ins. Co., 1 N.C. App. 94, 160 S.E.2d 117 (1968).

§ 31A-4. Slayer barred from testate or intestate succession and other rights.

Estate of Decedent Determined at Date of Her Actual Death.—This section makes no attempt artificially to alter the date of the death of the decedent but provides instead that the actual date of death of the slayer is to be disregarded. Therefore, if the language of the statute is followed, the estate of the decedent is determined at the date of her actual death, and the law calls the roll of the class immediately as of that time; those who can then answer, take. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

This section provides in part that, for purposes of distributing the estate of the decedent, "the slayer shall be deemed to have died immediately prior to the death of the decedent." In view of this express statutory presumption, it is clear that the words "the estate of the wife" as the same are used in § 31A-5 (2) mean the estate of the murdered wife as the same comes into existence at the instant of her death, and the title to the entireties property at that moment passes to those persons who would be entitled to succeed to her interest

in such property as of the moment of her death if she had in fact survived her husband, subject only to his recognized right to "hold" the property during his lifetime. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

§ 31A-5. Entirety property.

"Estate".—The word "estate" as used in this section means those persons, other than the slayer, who succeed to the rights of the decedent either by testate or intestate succession as the case may be. To accomplish the purpose of this section and consistent with the clear language of § 31A-4, the slayer cannot be included in this class. In cases in which the decedent has made testamentary disposition of the real property involved, this interpretation gives effect to the decedent's will. If there is no will, or if the decedent left a will but made no disposition therein of the real property involved, the decedent's "estate" consists of those persons who become entitled to succeed to the decedent's property under the intestate succession laws. In either event under § 31A-4 the slayer is not included. Porth v. Porth, 3 N. C. App. 485, 165 S.E.2d 508 (1969).

The correctness of the interpretation of the words "estate of the wife" in subdivision (2) as meaning the estate as it came into existence at the moment of her actual death, is strengthened by an examination of subdivision (1) of this section, which deals with the situation when the wife is the slayer. In such case the statute provides that "one half of the property shall pass upon the death of the husband to his estate, and the other one half shall be held by the wife, subject to pass upon her death to the estate of the husband." It is not reasonable to suppose that the legislature in subdivision (1) intended the word "estate" to have one meaning as to one half of the property and another meaning as to the other one half. Rather, it is more reasonable to suppose that the word "estate" as twice used in the same sentence was intended to have the same meaning, and that it refers to the estate of the deceased as such estate comes into existence at the moment of actual death. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

The language "he shall hold all of the property during his life" was employed by the legislature, not for the purpose of barring any alienation of the property until after the slayer-husband's death, but in order to recognize and preserve the husband's lifetime rights in the property. The legislature clearly intended that even the slayer-husband should not forfeit what was always recognized as his—the right to possession and income from the property for his lifetime. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

The words "shall hold," as used in this section were not intended to effect a complete restraint on alienation during the husband's lifetime. On the contrary, the word "hold," as used in the statute, is used in the same sense as when used in the habendum clause of a deed, Certainly the word "hold" as used in the habendum clause of a deed is never construed to place a restraint on alienation, and the very words used in this statute, "hold all of the property during his life subject to pass upon his death to the estate of the wife," if used in a deed, would not prevent the husband from selling his life interest in the property. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

The words "pass upon his death" refer exclusively to possession and enjoyment of the property and not to vesting in interest. In effect, the slayer-husband holds a life estate in the property with a vested remainder in the estate of his deceased wife, and the persons entitled to succeed to her estate are to be determined as of the actual date of her death, not as of the subsequent date when the husband's life estate terminates upon his death. This interpretation is further supported by the express language of this chapter as well as by reference to the purposes to be achieved by the statute. Porth v, Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

"The Estate of the Wife."—Section 31A-4 provides in part that, for purposes of distributing the estate of the decedent, "the slayer shall be deemed to have died immediately prior to the death of the decedent." In view of this express statutory presumption, it is clear that the words "the estate of the wife" as the same are used in subdivision (2) mean the estate of the murdered wife as the same comes into existence at the instant of her death, and the title to the entireties property at that moment passes to those persons who would be entitled to succeed to her interest in such property as of the moment of her death if she had in fact survived her husband, subject only to his recognized right to "hold" the property during his lifetime. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

Section recognizes distinction in rights held by husband as compared with rights held by wife in entirety property by pro-

viding that the slayer-husband shall hold all of the property during his life subject to pass upon his death to the estate of the wife, whereas the slayer-wife is to hold only one half of the property during her lifetime subject to pass upon her death to the estate of the husband, while the other one half of the property in such case shall pass upon the death of the husband to his estate. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

The slayer-husband holds the interest of his deceased wife in the property as a trustee for her heirs at law. He should be perpetually enjoined from conveying the property in fee; the plaintiffs should be adjudged the sole owners, upon the decedent's death, of the entire property as the heirs of their deceased mother. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

Slayer-Husband Has Right to Lifetime Possession, Income and Usufruct. — In preserving the slayer-husband's right to hold all of the property during his life, subdivision (2) of this section recognizes his right to the lifetime possession, income, and usufruct, of the property, and thereby avoids the possibility that the statute might be considered unconstitutional as working a forfeiture of a vested property right for crime. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

Where husband and wife own real property as tenants by the entirety, the husband is solely entitled, to the exclusion of the wife, to the possession, income, and usufruct of such property during their joint lives. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

Estate of Decedent Determined at Date of Her Actual Death. — Section 31A-4 makes no attempt artificially to alter the date of the death of the decedent, but provides instead that the actual date of death of the slayer is to be disregarded. Therefore, if the language of the statute is followed, the estate of the decedent is determined at the date of her actual death, and the law calls the roll of the class immediately as of that time; those who can then answer, take. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

This section does not bar the alienation of the entire title to the property by joint conveyance of the slayer-husband and the heirs of the decedent. To so interpret the statute would run contrary to the established policy of North Carolina law, which is to prevent undue restraint upon or suspension of the right of alienation. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

The slayer-husband cannot convey more than his own interest in the entirety property and certainly no conveyance of his can work a detriment to the rights of the estate of his deceased wife. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

Where there is a bequest to one for life, and after his decease to the testator's next of kin, the next of kin who are to take are the persons who answer that description at the death of the testator, and not those who answer that description at the death of the first taker. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

§ 31A-6. Survivorship Property.

The slayer-husband should have only the income during his lifetime from his one-half share of a joint bank account, subject to the rights of his creditors, and at his death the principal should pass to the estate of his deceased wife. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

ARTICLE 4.

General Provisions.

§ 31A-13. Record determining slayer admissible in evidence.

Cited in Tew v. Durham Life Ins. Co., 1 N.C. App. 94, 160 S.E.2d 117 (1968).

Chapter 32.

Fiduciaries.

Article 1.

Uniform Fiduciaries Act.

§ 32-2. Definition of terms.

Editor's Note.—For article on constructive trusts in North Carolina, see 45 N.C.L. Rev. 424 (1967).

Article 3.

Powers of Fiduciaries.

§ 32-25. Definitions.

Editor's Note.—For note on "The North Carolina Fiduciary Powers Act and the Duty of Loyalty," see 45 N.C.L. Rev. 1141 (1967).

§ 32-27. Powers which may be incorporated by reference in trust instrument.

(5) Continue Business.—To the extent and upon such terms and conditions and for such periods of time as the fiduciary shall deem necessary or advisable, to continue or participate in the operation of any business or other enterprise, whatever its form of organization, including but not limited to the power:

a. To effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise;

b. To dispose of any interest therein or acquire the interest of others therein;

c. To contribute thereto or invest therein additional capital, or to lend money thereto, in any such case upon such terms and conditions as the fiduciary shall approve from time to time;

d. To determine whether the liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate or trust set aside for use in the business or to the estate or trust as a whole; and

e. In all cases in which the fiduciary is required to file accounts in any court or in any other public office, it shall not be necessary to itemize receipts and disbursements and distributions of property but it shall be sufficient for the fiduciary to show in the account a single figure or consolidation of figures, and the fiduciary shall be permitted to account for money and property received from the business and any payments made to the business in lump sum without itemization.

(29) Apportion and Allocate Receipts and Expenses.—Where not otherwise provided by the Uniform Principal and Income Act, as contained in chapter 37 of the General Statutes, to determine:

a. What is principal and what is income of any estate or trust and to allocate or apportion receipts and expenses as between principal and income in the exercise of the fiduciary's discretion, and, by way of illustration and not limitation of the fiduciary's discretion, to charge premiums on securities purchased at a premium against principal or income or partly against each;

b. Whether to apply stock dividends and other noncash dividends to income or principal or apportion them as the fiduciary shall deem advisable; and

c. What expenses, costs, taxes (other than estate, inheritance, and succession taxes and other governmental charges) shall be charged against principal or income or apportioned between principal and income and in what proportions.

(1967, c. 24, s. 15; c. 956.)

Editor's Note.—Session Laws 1967, c. 24, originally effective Oct. 1, 1967, substituted, in paragraph (c) of subdivision (5), "contribute thereto or invest therein additional capital" for "contribute or invest additional capital thereto." Session Laws 1967, c. 1078, amends c. 24 of the amendatory act so as to make it effective July 1, 1967.

Session Laws 1967, c. 956, effective Oct. 1, 1967, inserted "Where not otherwise provided by the Uniform Principal and Income Act, as contained in chapter 37 of the General Statutes," at the beginning of subdivision (29).

As the rest of the section was not changed by the amendments, only subdivisions (5) and (29) are set out.

Chapter 33.

Guardian and Ward.

Article 8.

Estates without Guardian.

ARTICLE 1.

Creation and Termination of Guardianship.

§ 33-1. Jurisdiction in clerk of superior court.

The superior court has no power to appoint a general guardian, in the absence of other matters of which the court has jurisdiction. In re Simmons, 266 N.C. 702, 147 S.E.2d 231 (1966).

Applied in Grant v. Banks, 270 N.C. 473, 155 S.E.2d 87 (1967).

Quoted in In re Michal, 273 N.C. 504, 160 S.E.2d 495 (1968).

§ 33-7. Proceedings on application for guardianship.

Quoted in In re Simmons, 266 N.C. 702, 147 S.E.2d 231 (1966).

§ 33-9. Removal by clerk.

Section 1-276 Is Inapplicable to Removals.—Appeals under § 1-276 are confined to civil actions and special proceedings. The decisions are plenary that the removal of a guardian is neither. In re Simmons, 266 N.C. 702, 147 S.E.2d 231 (1966).

Appellate Jurisdiction of Superior Court over Removals Is Derivative.—In the appointment and removal of guardians, the appellate jurisdiction of the superior court is derivative, and appeals present for review only errors of law committed by the clerk. In re Simmons, 266 N.C. 702, 147 S.E.2d 231 (1966).

Stated in In re Michal, 273 N.C. 504, 160 S.E.2d 495 (1968).

ARTICLE 2.

Guardian's Bond.

§ 33-12. Bond to be given before receiving property. — No guardian appointed for an infant, idiot, lunatic, insane person or inebriate, shall be permitted to receive property of the infant, idiot, lunatic, insane person or inebriate until he shall have given sufficient security, approved by a judge, or the court, to account for and apply the same under the direction of the court; provided, however, that when a guardian is appointed for an infant, idiot, lunatic, insane person or inebriate for the purpose of bringing an action on behalf of that infant, idiot,

lunatic, insane person or inebriate and when there are no other assets in the ward's estate or other assets belonging to the minor in the State of North Carolina, such guardian shall not be required to give sufficient security until such time as the property is turned over to such guardian, at which time the guardian shall give sufficient security approved by a judge or the court to account for and apply the same under the directions of the court. (C. C. P., s. 355, Code, s. 1573; Rev., s. 1777; C. S., s. 2161; 1967, c. 40, s. 1.)

Editor's Note. — The 1967 amendment added the proviso. Section 2 of the amendatory act provides: "All laws and clauses of laws in conflict with this act are hereby repealed, except that such laws shall continue in force and effect with respect to actions already filed by guardians who have obtained bonds before the effective date of this act." The act was ratified March 14, 1967, and made effective on ratification.

§ 33-17. Relief of endangered sureties.

Successor Guardian and Ward Are Not Bound by Adjudication If Not Parties.—A determination in a proceeding between the surety and the former guardian is not conclusive as against a successor guardian and the ward, neither of whom was a party to that proceeding when the adjudication was made. State ex rel. Northwestern Bank v. Fidelity & Cas. Co., 268 N.C. 234, 150 S.E.2d 396 (1966).

Article 3.

Powers and Duties of Guardian.

§ 33-20. Guardian to take charge of estate.

Guardian Must Preserve Estate and Enforce Ward's Rights.—It is the duty of the guardian to preserve the estate of the ward and to take practicable action to enforce the ward's rights against others. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

He Must Diligently Collect Obligation Owing Ward.—It is the duty of a guardian of the estate of an incompetent person to exercise due diligence in the collection of an obligation owing to the ward. The guardian is liable to the ward's estate for any loss to it by his failure to do so. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

Including Damages for Wrongs Done Ward.—It is the duty of the guardian of the estate of an incompetent to collect, insofar as practicable, all moneys due the ward, including damages for wrongs done to the ward which are known to the guardian. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

He Is Liable for All He Ought to Have Received.—A guardian is liable not only for what he receives, but for all he ought to have received of his ward's estate. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

Article 4.

Sales of Ward's Estate.

§ 33-31. Special proceedings to sell; judge's approval required.— On application of the guardian or ancillary guardian appointed pursuant to G.S. 33-31.2, by petition, verified upon oath, to the superior court, showing that the interest of the ward would be materially promoted by the sale or mortgage of any part of his estate, real or personal, the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, a decree may thereupon be made that a sale or mortgage be had by such person, in such way and on such terms as may be most advantageous to the interest of the ward; all petitions filed under the authority of this section wherein an order is sought for the sale or mortgage of the ward's real estate or both real and personal property shall be filed in the superior court of the county in which all or any part of the real estate is situated; if the order of sale demanded in the petition is for the sale or mortgage of the ward's personal estate, the petition may be filed in the

superior court of the county in which any or all of such personal estate is situated; no mortgage shall be made until approved by the judge of the court, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by the judge, and the proceeds of the sale or mortgage shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify, provided that on and after January 1, 1968, no sales of property belonging to minors or incompetents prior to July 3, 1967, by next friend, guardian ad litem, or commissioner of the court regular in all other respects shall be declared invalid nor shall any claim or defense be asserted on the grounds that said sale was not made by a duly appointed guardian as provided herein or on the grounds that said minor or incompetent was not represented by a duly appointed guardian. The guardian may not mortgage the property of his ward for a term of years in excess of the term fixed by the court in its decree. The word "mortgage" whenever used herein shall be construed to include deeds in trust. The word "guardian" whenever used herein shall be construed to include next friend, guardian ad litem, or commissioner of the court acting pursuant to this article. Nothing herein contained shall be construed to divest the court of the power to order private sales as heretofore ordered in proper cases. The procedure for a sale pursuant to this section shall be provided by article 29A of chapter 1 of the General Statutes. (1827, c. 33; R. C., c. 54, ss. 32, 33; 1868-9, c. 201, s. 39; Code, s. 1602; Rev., s. 1798; 1917, c. 258, s. 1; C. S., s. 2180; 1923, c. 67, s. 1; 1945, c. 426, s. 1; c. 1084, s. 1; 1949, c. 719, s. 2; 1951, c. 366, s. 2; 1967, c. 1084.)

Editor's Note.—

The 1967 amendment added the proviso at the end of the first sentence and inserted the present fourth sentence.

Same—Clerk.—

A clerk of the superior court has no jurisdiction with respect to infants or with respect to property, real or personal, of infants, except such as is conferred by statute. Wilson v. Pemberton, 266 N.C. 782, 147 S.E.2d 217 (1966).

Order of Sale, etc.—

The power of a guardian to make disposition of his ward's estate is very carefully regulated, and the sale is not allowed except by order of court, which order must have the supervision, approval and confirmation of the resident judge of the district or the judge regularly holding the courts of the district. Pike v. Wachovia Bank & Trust Co., 274 N.C. 1, 161 S.E.2d 453 (1968).

No Liability on Implied Warranty of Authority.—A guardian who contracts to convey the property of his ward is not liable on an implied warranty of authority. Pike v. Wachovia Bank & Trust Co., 274 N.C. 1, 161 S.E.2d 453 (1968).

Petition Signed by Person, etc.—

A clerk of the superior court has the power to authorize the sale of property, real or personal, owned by an infant, only upon the application of his duly appointed and duly qualified guardian by petition duly verified by such guardian. An order made by a clerk of the superior court for the sale of the infant's property, real or personal, on the petition of one who is not his duly appointed and duly qualified guardian is void. All proceedings under color of such order are void, and no rights to the property of the infant can be acquired under such order. Wilson v. Pemberton, 266 N.C. 782, 147 S.E.2d 217 (1966) (decided prior to the 1967 amendment to this section).

And in Such Case, etc.—

In accord with original. See Wilson v. Pemberton, 266 N.C. 782, 147 S.E.2d 217 (1966) (decided prior to the 1967 amendment to this section).

§ 33-32. Fund from sale has character of estate sold and subject to same trusts.

Proceeds Descend as Realty on Death of Lunatic. — The general rule is that where the real estate of a lunatic is sold under a statute or by order of court, the proceeds of sale remain realty for the purpose of devolution on his death intestate while still a lunatic. Grant v. Banks, 270 N.C. 473, 155 S.E.2d 87 (1967), commented on in 46 N.C.L. Rev. 687 (1968).

Article 5.

Returns and Accounting.

§ 33-39. Annual accounts.

Opinions of Attorney General.—Honorable Lanie M. Hayes, Clerk of Superior Court, Warren County, 9/17/69.

§ 33-41. Final account.

Opinions of Attorney General.—Honorable Lanie M. Hayes, Clerk of Superior Court, Warren County, 9/17/69.

§ 33-42. Expenses and disbursements credited to guardian.

Cited in State ex rel. Northwestern Bank v. Fidelity & Cas. Co., 268 N.C. 234, 150 S.E.2d 396 (1966).

Article 8.

Estates without Guardian.

§§ 33-50, 33-51: Repealed by Session Laws 1967, c. 218, s. 4.

Article 12.

Gifts of Securities and Money to Minors.

§ 33-71. Duties and powers of custodian.

(b) The custodian shall pay over to the minor for expenditure by him, or expend for the minor's benefit, so much of or all the custodial property as the custodian deems advisable for the support, maintenance, education and benefit of the minor in the manner, at the time or times, and to the extent that the custodian in his discretion deems suitable and proper, with or without court order, with or without regard to the duty of himself or of any other person to support the minor or his ability to do so, and with or without regard to any other income or property of the minor which may be applicable or available for any such purpose.

Editor's Note.—Subsection (b) is set out in this Supplement to correct a typographical error appearing in the replacement volume.

Chapter 34.

Veterans' Guardianship Act.

Sec.

34-4. Guardian may not be named for more than five wards; exceptions; banks and trust companies, public guardians, or where wards are members of same family.

§ 34-4. Guardian may not be named for more than five wards; exceptions; banks and trust companies, public guardians, or where wards are members of same family.—It shall be unlawful for any person, other than a public guardian qualified under article 6, chapter 33, General Statutes of North Carolina, to accept appointment as guardian of any United States Veterans Administration ward, if such person shall at the time of such appointment be acting as guardian for five wards. For the purpose of this section, all minors of same family unit shall constitute one ward. In all appointments of a public guardian for United States Veterans Administration wards, the guardian shall furnish a sepa-

rate bond for each appointment as required by G.S. 34-9. If, in any case, an attorney for the United States Veterans Administration presents a petition under this section alleging that an individual guardian other than a public guardian is acting in a fiduciary capacity for more than five wards and requesting discharge of the guardian for that reason, then the court, upon satisfactory evidence that the individual guardian is acting in a fiduciary capacity for more than five wards, must require a final accounting forthwith from such guardian and shall discharge the guardian in such case. Upon the termination of a public guardian's term of office, he may be permitted to retain any appointments made during his term of office.

This section shall not apply to banks and trust companies licensed to do trust business in North Carolina. (1929, c. 33, s. 4; 1967, c. 564, s. 1.)

Editor's Note. — The 1967 amendment, effective July 1, 1967, rewrote this section.

§ 34-10. Guardian's accounts to be filed; hearing on accounts.— Every guardian, who shall receive on account of his ward any moneys from the Bureau, shall file with the court annually, on the anniversary date of the appointment, in addition to such other accounts as may be required by the court, a full, true, and accurate account under oath of all moneys so received by him, of all disbursements thereof, and showing the balance thereof in his hands at the date of such account and how invested. A certified copy of each of such accounts filed with the court shall be sent by the guardian to the office of the Bureau having jurisdiction over the area in which such court is located.

At the time such account is filed the clerk of the superior court shall require the guardian to exhibit to the court all investments and bank statements showing cash balance and the clerk of the superior court shall certify on the original account and the certified copy which the guardian sends the Bureau that an examination was made of all investments and cash balance and that same are correctly stated in the account; provided that banks, organized under the laws of North Carolina or the Acts of Congress, engaged in doing a trust and fiduciary business in this State, when acting as guardian, or in other fiduciary capacity, shall be exempt from the requirement of exhibiting such investments and bank statements, and the clerk of the superior court shall not be required to so certify as to the accounts of such banks, except that in addition to the officers verifying the account, there shall be added a certificate of other officers of the bank certifying that all assets referred to in the account are held by the guardian. If objections are raised to such an accounting, the court shall fix a time and place for the hearing thereon not less than fifteen days nor more than thirty days from the date of filing such objections, and notice shall be given by the court to the aforesaid Bureau office and the North Carolina Department of Veterans Affairs by mail not less than fifteen days prior to the date fixed for the hearing. Notice of such hearing shall also be given to the guardian. (1929, c. 33, s. 10; 1933, c. 262; s. 1; 1945, c. 723, s. 2; 1961, c. 396, s. 2; 1967, c. 564, s. 5.)

Editor's Note.— The 1967 amendment, effective July 1, 1967, substituted "North Carolina Department of Veterans Affairs" for "North Carolina Veterans Commission" near the end of the section.

§ 34-12. Compensation at 5 percent; additional compensation; premiums on bonds.—Compensation payable to guardians shall not exceed five percent of the income of the ward during any year, except that the court may approve compensation in the accounting in an amount not to exceed twenty-five dollars ($25.00) from an estate where the income for any one year is less than five hundred dollars ($500.00). In the event of extraordinary services rendered by such guardian the court may, upon petition and after hearing thereon, authorize additional compensation therefor, payable from the estate of the ward. Notice of such petition and hearing shall be given the proper office of the Bureau and the North Carolina Department of Veterans Affairs in the manner provided in § 34-10.

No compensation shall be allowed on the corpus of an estate received from a preceding guardian. The guardian may be allowed from the estate of his ward reasonable premiums paid by him to any corporate surety upon his bond. (1929, c. 33, s. 12; 1945, c. 723, s. 2; 1967, c. 564, ss. 2, 5.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, added the exception clause to the first sentence and substituted "North Carolina Department of Veterans Affairs" for "North Carolina Veterans Commission" in the third sentence.

§ 34-13. Investment of funds.

(3) By loaning the same upon real estate securities in which the guardian has no interest, such loans not to exceed fifty percent (50%) of the actual appraised or assessed value, whichever may be lower, and said loans when made to be evidenced by a note, or notes, or bond, or bonds, under seal of the borrower and secured by first mortgage or first deed of trust. Said guardian before making such investment on real estate mortgages shall secure a certificate of title from some reputable attorney certifying that the same is the first lien on real estate and also setting forth the tax valuation thereof for the current year: Provided, said guardian may purchase with said funds a home or farm for the sole use of said ward or his dependents upon petition and order of the clerk of superior court, said order to be approved by the resident or presiding judge of the superior court, and provided further that copy of said petition shall be forwarded to said Bureau before consideration thereof by said court. Any guardian may encumber the home or farm so purchased for the entire purchase price or balance thereof to enable the ward to obtain benefits provided in Title 38, U.S. Code, chapter 37, upon petition to and order of the clerk of superior court of the county of appointment of said guardian and approved by the resident or presiding judge of the superior court. Notice of hearing on such petition, together with copy of the petition, shall be given to the United States Veterans Administration and the North Carolina Department of Veterans Affairs by mail not less than 15 days prior to the date fixed for the hearing.

(5) By depositing the funds either in a savings account in any federally insured bank in North Carolina or by purchasing a certificate of deposit issued by any federally insured bank in North Carolina, to the extent that such investment is insured by the Federal Deposit Insurance Corporation.

(1967, c. 564, ss. 3, 4.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, added the last two sentences of subdivision (3) and added "to the extent that such investment is insured by the Federal Deposit Insurance Corporation" at the end of subdivision (5). As the rest of the section was not changed by the amendment, only subdivisions (3) and (5) are set out.

§ 34-14. Application of ward's estate.—A guardian may apply any income received from the Veterans Administration for the benefit of the ward in the same manner and to the same extent as other income of the estate without the necessity of securing an order of court. A guardian shall not apply any portion of the estate of his ward for the support and maintenance of any person other than his ward, except upon order of the court after a hearing, notice of which has been given the proper officer of the Bureau and the North Carolina Department of Veterans Affairs in the manner provided in § 34-10. (1929, c. 33, s. 14; 1945, c. 723, s. 2; 1961, c. 396, s. 3; 1967, c. 564, s. 5.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, substituted "North Carolina Department of Veterans Affairs" for "North Carolina Veterans Commission" near the end of the section.

§ 34-15. Certified copy of record required by Bureau to be furnished without charge.—Whenever a copy of any public record is required by the Bureau or the North Carolina Department of Veterans Affairs to be used in determining the eligibility of any person to participate in benefits made available by such Bureau, the official charged with the custody of such public record shall without charge provide the applicant for such benefits or any person acting on his behalf or the representative of such Bureau or the North Carolina Department of Veterans Affairs with a certified copy of such record. (1929, c. 33, s. 15; 1945, c. 723, s. 2; 1967, c. 564, s. 5.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, substituted "North Carolina Department of Veterans Affairs" for "North Carolina Veterans Commission" in two places in this section.

Chapter 35.

Persons with Mental Diseases and Incompetents.

Article 7.
Sterilization of Persons Mentally Defective.

ARTICLE 2.

Guardianship and Management of Estates of Incompetents

§ 35-2. Inquisition of lunacy; appointment of guardian.

There is no completely satisfactory definition of the phrase "incompetent from want of understanding to manage his own affairs." Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Incompetency to administer one's property obviously depends upon the general frame and habit of mind, and not upon specific actions, such as may be reflected by eccentricities, prejudices, or the holding of particular beliefs. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

The word "affairs" encompasses a person's entire property and business, not just one transaction or one piece of property to which he may have a unique attachment. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Test.—Under this section, if a person's mental condition is such that he is incapable of transacting the ordinary business involved in taking care of his property, if he is incapable of exercising rational judgment and weighing the consequences of his acts upon himself, his family, his property and estate, he is incompetent to manage his affairs. On the other hand, if he understands what is necessarily required for the management of his ordinary business affairs and is able to perform those acts with reasonable continuity, if he comprehends the effect of what he does, and can exercise his own will, he is not lacking in understanding within the meaning of the law, and he cannot be deprived of the control of his litigation or property. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Mere weakness of mind will not be sufficient to put a person among those who are incompetent to manage their own affairs. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Eccentricity, like profligacy, may coexist with the ability to manage one's property. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

An adult plaintiff who is not an idiot or lunatic must be non compos mentis before the court has jurisdiction to appoint a next friend for him. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

No Substantial Difference between Next Friend and Guardian Ad Litem.—Although technically a next friend represents a plaintiff and a guardian ad litem represents a defendant, there is no substantial

difference between the two. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

The class of persons for whom next friends and guardians ad litem may be appointed are the same. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

To authorize the appointment of next friend or guardian ad litem, it is not enough to show that another might manage a man's property more wisely or efficiently than he himself. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

An inquisition is not always a condition precedent for the appointment of a next friend or a guardian ad litem. In an emergency, when it is necessary, pendente lite, to safeguard the property of a person non compos mentis whose incompetency has not been adjudicated, the protection of the court may be invoked in his behalf by one acting as next friend. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Neither a next friend nor a guardian ad litem has authority to receive money or administer the litigant's property. His powers are coterminous with the beginning and end of the litigation in which he is appointed. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Notice and Opportunity to Be Heard. —When a party's lack of mental capacity is asserted and denied, and he has not previously been adjudicated incompetent to manage his affairs, he is entitled to notice and an opportunity to be heard before the judge can appoint either a next friend or a guardian ad litem for him. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

A person for whom a next friend or guardian ad litem is proposed is entitled to notice as in case of an inquisition of lunacy under this section. This statute does not specify the time but, by analogy to former § 1-581, ten days' notice would be appropriate unless the court, for good cause, should prescribe a shorter period. If, at the time appointed for the hearing, the party does not deny the allegation that he is incompetent, and the judge is satisfied that the application is made in good faith and that the party is non compos mentis, the judge may proceed to appoint a next friend to act for him. If, however, he asserts his competency, he is entitled to have the issue determined as provided in this section. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Right to Traverse Inquisition. — From the earliest times the common law and the course of the legislation in common-law states has guarded sedulously the right of persons accused of incompetency of any kind to traverse the inquisition or other proceeding in the nature of one de lunatico inquirendo. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Conclusiveness of Adjudication.—

The executed contract of a mentally incompetent person is ordinarily voidable and not void. If, however, the person has been adjudged incompetent from want of understanding to manage his affairs and the court has appointed a guardian for him, he is conclusively presumed insane insofar as parties and privies to the guardianship proceedings are concerned; as to all others, it is presumptive (but rebuttable) proof of the ward's incapacity. Chesson v. Pilot Life Ins. Co., 268 N.C. 98, 150 S.E.2d 40 (1966).

Quoted in In re Michal, 273 N.C. 504, 160 S.E.2d 495 (1968).

§ 35-2.1. Guardian appointed when issues answered by jury in any case.

Stated in Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

§ 35-3. Guardian appointed on certificate from hospital for insane or training school.

Quoted in Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Article 4.

Mortgage of Sale of Estates Held by the Entireties.

§ 35-14. Where one spouse or both incompetent; special proceeding before clerk.

Cited in North Carolina State Highway Comm'n v. Myers, 270 N.C. 258, 154 S.E.2d 87 (1967).

Article 7.

Sterilization of Persons Mentally Defective.

§ 35-36. State institutions authorized to sterilize mental defectives. —The governing body or responsible head of any penal or charitable institution supported wholly or in part by the State of North Carolina, or any subdivision thereof, is hereby authorized and directed to have the necessary operation for asexualization, or sterilization, performed upon any mentally diseased or feeble-minded inmate or patient thereof, as may be considered best in the interest of the mental, moral, or physical improvement of the patient or inmate, or for the public good: Provided, however, that no operation described in this section shall be lawful unless and until the provisions of this article shall first be complied with. (1933, c. 224, s. 1; 1967, c. 138, s. 1.)

Editor's Note.— The 1967 amendment deleted provisions making this section applicable to epileptic inmates or patients.

§ 35-37. Operations on mental defectives not in institutions. — It shall be the duty of the board of commissioners of any county of North Carolina, at the public cost and expense, to have one of the operations described in § 35-36, performed upon any mentally diseased or feeble-minded resident of the county, not an inmate of any public institution, upon the request and petition of the director of public welfare or other similar public official performing in whole or in part the functions of such director, or of the next of kin, or the legal guardian of such mentally defective person: Provided, however, that no operation described in this section shall be lawful unless and until the provisions of this article shall be first complied with. (1933, c. 224, s. 2; 1961, c. 186; 1967, c. 138, s. 2.)

Editor's Note. — The 1967 amendment deleted provisions making this section applicable to epileptics.

§ 35-38. Restrictions on such operations.—No operation under this article shall be performed by other than a duly qualified and registered North Carolina physician or surgeon, and by him only upon a written order signed after complete compliance with the procedure outlined in this article by the responsible executive head of the institution or board, or the director of public welfare, or other similar official performing in whole or in part the functions of such director, or the next of kin or legal guardian having custody or charge of the feeble-minded or mentally defective inmate, patient or noninstitutional individual. (1933, c. 224, s. 3; 1961, c. 186; 1967, c. 138, s. 3.)

Editor's Note. — The 1967 amendment deleted a reference to epileptics near the end of the section.

§ 35-39. Prosecutors designated; duties.—If the person upon whom the operation is to be performed is an inmate or patient of one of the institutions mentioned in § 35-36, the executive head of such institution or his duly authorized agent shall act as prosecutor of the case. The county director of public welfare may act as prosecutor or petitioner in instituting sterilization proceedings in the case of any feeble-minded or mentally diseased person who is on parole from a State institution, and in the case of any such person who is an inmate of a State

institution, when authorized to do so by the superintendent of such institution. If the person upon whom the operation is to be performed is an inmate or patient of a charitable or penal institution supported by the county, the executive head of such institution or his duly authorized agent, or the county director of welfare or such other official performing in whole or in part the functions of such director of the county in which such county institution is situated, shall act as petitioner in instituting proceedings before the Eugenics Board. If the person to be operated upon is not an inmate of any such public institution, then the director of welfare or such other official performing in whole or in part the functions of such director of the county of which said inmate, patient, or noninstitutional individual to be sterilized is a resident, shall be the prosecutor.

It shall be the duty of such prosecutor promptly to institute proceedings as provided by this article in any of the following circumstances:

(1) When in his opinion it is for the best interest of the mental, moral or physical improvement of the patient, inmate, or noninstitutional individual, that he or she be operated upon.

(2) When in his opinion it is for the public good that such patient, inmate or noninstitutional individual be operated upon.

(3) When in his opinion such patient, inmate, or noninstitutional individual would be likely, unless operated upon, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency.

(4) When requested to do so in writing by the next of kin or legal guardian of such patient, inmate or noninstitutional individual.

(5) In all cases as provided for in § 35-55. (1933, c. 224, s. 4; 1935, c. 463, s. 1; 1937, c. 243; 1961, c. 186; 1967, c. 138, s. 4.)

Editor's Note. — The 1967 amendment deleted "epileptic" following "feeble-minded" in the second sentence.

§ 35-42. Secretary of Board and duties.—The State Commissioner of Public Welfare shall designate an employee of the State Department of Public Welfare as secretary of the Eugenics Board. The secretary shall perform all duties imposed by the statutes and required by the Eugenics Board. (1933, c. 224, s. 7; 1969, c. 677.)

Editor's Note. — Session Laws 1969, c. 677, effective July 1, 1969, repealed former § 35-42, which provided for a secretary to be appointed by the Board, and enacted the above section in its place.

§ 35-44. Copy of petition served on patient.—(a) A copy of said petition, duly certified by the secretary of the said Board to be correct, must be served upon the inmate, patient or individual resident, together with a notice in writing signed by the secretary of the said Board designating the time and place not less than twenty days before the presentation of such petition to said Board when and where said Board will hear and pass upon such petition. It shall be sufficient service if the copy of said petition and notice in writing be delivered to said inmate, patient or individual resident, and it shall not be necessary to read the above-mentioned document to said patient, inmate or individual resident.

Editor's Note.—Subsection (a) of this section is set out above to correct an error appearing in the replacement volume.

§ 35-48. Right of appeal to superior court.—If it appears to the inmate, patient or individual resident, or to his or her representative, guardian, parent or next of kin, or to the solicitor, that the proceedings taken are not in accordance with the law, or that the reasons given for asexualization or sterilization are not adequate or well founded, or for any other reason the order is not legal, or is not legal as applied to this inmate, patient or individual resident,

he or she may within fifteen days from the date of such order have an appeal of right to the superior court of the county in which said inmate or patient resided prior to admission to the institution, or the county in which the noninstitutional individual resides. This appeal may be taken by giving notice in writing to any member of the Board and to the other parties to the proceeding, including the doctor who is designated to perform the said operation. Upon the giving of this notice the petitioner within fifteen days thereafter shall cause a copy of the petition, notice, evidence and orders of the said Board certified by any member thereof to be sent to the clerk of the said court, who shall file the same and docket the appeal to be heard and determined by the said court as soon thereafter as may be practicable.

The presiding judge of said superior court may hear the appeal upon affidavit or oral evidence and in determining such an appeal may consider the record of the proceedings before the Eugenics Board, including the evidence therein appearing together with such other legal evidence as may be offered to the said judge by any party to the appeal. In hearing such an appeal the general public may be excluded and only such persons admitted thereto as have direct interest in the case.

Upon such appeal the said superior court may affirm, revise, or reverse the orders of the said Board appealed from and may enter such order as it deems just and right and which it shall certify to the said Board.

The pendency of such appeal shall automatically, and without more, stay proceedings under the order of the said Board until the appeal be completely determined. Should the decision of the superior court uphold the plaintiff's objection, such decision unless appealed from will annul the order of the Board to proceed with the operation, and the matter may not be brought up again until one year has elapsed except by the consent of the plaintiff or his next of kin, or his legal representatives. Should the court affirm the order of the Board, then, if no notice of appeal to the appellate division is filed within ten days after such decision, said Board's recommendation as affirmed shall be put into effect at a time fixed by the original prosecutor or his successor in office and the inmate, patient or individual shall be asexualized or sterilized as provided in this article.

In this appeal the person for whom an order of asexualization or sterilization has been issued shall be designated as the plaintiff, and the prosecutor presenting the original petition shall be designated as defendant. (1933, c. 224, s. 13; 1935, c. 463, s. 4; 1969, c. 44, s. 44.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" in the last sentence of the fourth paragraph.

§ 35-50. Appeal to appellate division.—Any party to such appeal to the superior court may, within ten days after the date of the final order therein, apply for an appeal to the appellate division, which shall have jurisdiction to hear and determine the same upon the record of the proceedings in the superior court and to enter such order as it may find the superior court should have entered.

The pendency of an appeal in the appellate division shall operate as a stay of proceedings under any orders of the said Board and the superior court until the appeal be determined by the appellate division. (1933, c. 224, s. 15; 1969, c. 44, s. 45.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" three times in the section and deleted "said" which formerly preceded "Supreme Court" at the end of the section.

§ 35-57. Temporary admission to State hospitals for sterilization.—Any feeble-minded or mentally diseased person, for whom the Eugenics Board of North Carolina has authorized sterilization, may be admitted to the appropriate State hospital for the performance of such operation. The order of the Eugenics Board authorizing a surgeon on the regular or consulting staff of the hospital to

perform the operation will be sufficient authority to the superintendent of such hospital to receive, restrain, and control the patient until such time as it is deemed wise to release such patient. All such admissions shall be at the discretion of the superintendent of the State hospital, and in making any agreement with any county or any State institution to perform such operations, the State hospital may collect a fee which shall not be greater than the cost of such operation and the cost of care and maintenance for the duration of the operation and the time required for the patient to recuperate.

The order of the Eugenics Board and the agreement of the superintendent of the State hospital to admit such patient shall be full and sufficient authority for the prosecutor or the sheriff of the county to deliver such patient to the proper State hospital. (1937, c. 221; 1967, c. 138, s. 5.)

Editor's Note. — The 1967 amendment deleted "epileptic" following "feeble-minded" near the beginning of the section.

Article 12.

Council on Mental Retardation.

§ 35-74. Function of Council; meetings; annual report to Governor.

Opinions of Attorney General. — Mr. Jerome H. Melton, Assistant Superintendent of Public Instruction, 9/9/69.

Chapter 36.

Trusts and Trustees.

Article 3.

Resignation of Trustee.

Sec.
36-18.2. Trustee may renounce.

Article 4.

Charitable Trusts.

Sec.
36-23.2. Charitable Trusts Administration Act.

Article 1.

Investment and Deposit of Trust Funds.

§ 36-3. Investment in building and loan and federal savings and loan associations.—Guardians, executors, administrators, clerks of the superior court and others acting in a fiduciary capacity may invest funds in their hands as such fiduciaries in stock of any building and loan association organized and licensed under the laws of this State: Provided, that no such funds may be so invested unless and until authorized by the Commissioner of Insurance. Provided further, that such funds may be invested in stock of any federal savings and loan association organized under the laws of the United States, upon approval of an officer of the Home Loan Bank at Winston-Salem, or such other governmental agency as may hereafter have supervision of such associations. The authorization of the Commissioner of Insurance or an officer of the Home Loan Bank at Winston-Salem or other government agency having supervision will not be required to the extent that such funds are insured by the Federal Savings and Loan Insurance Corporation or by any mutual deposit guaranty association authorized by the Commissioner of Insurance of North Carolina to do business in North Carolina pursuant to article 7A of chapter 54 of the General Statutes. (1933, c. 549, s. 1; 1937, c. 14; 1953, c. 620; 1969, c. 861.)

Editor's Note. — The 1969 amendment added at the end of the section the provision as to insurance by a mutual deposit guaranty association authorized to do business in North Carolina.

By virtue of Session Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insurance Commissioner" in the first sentence of the section.

Article 3.

Resignation of Trustee.

§ 36-9. Clerk's power to accept resignations.

Stated in In re Michal, 273 N.C. 504, 160 S.E.2d 495 (1968).

Cited in King v. Snyder, 269 N.C. 148, 152 S.E.2d 92 (1967).

§ 36-14. On appeal judge determines facts. — Upon an appeal taken from the clerk to the judge, the judge shall have the power to review the findings of fact made by the clerk and to find the facts or to take other evidence, but the facts found by the judge shall be final and conclusive upon any appeal to the appellate division. (1911, c. 39, s. 5; C. S., s. 4028; 1969, c. 44, s. 46.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" at the end of the section.

§ 36-18.1. Appointment of successors to deceased or incapacitated trustees.

Cited in Beam v. Almond, 271 N.C. 509, 157 S.E.2d 215 (1967).

§ 36-18.2. Trustee may renounce. — (a) Any person or corporation named as trustee in any will admitted to probate in this State, or any substitute trustee, may, at any time prior to qualifying as required by G.S. 28-53 or taking any action as trustee if such qualification is not required, and whether or not such person or corporation is entitled to so qualify or act, renounce such trusteeship by a writing filed with the clerk of the superior court of the county in which the will is admitted to probate. Upon receipt of such renunciation the clerk shall give notice thereof to all persons interested in the trust, including successor or substitute trustees named in the will, which notice shall also comply with the requirements of subsection (e) of this section.

(b) If the will names or identifies a substitute trustee in case of renunciation, the provisions of the will shall be complied with, and the clerk shall enter an appropriate order appointing the substitute trustee in accordance therewith unless the substitute trustee also renounces. A substitute trustee so named shall succeed to the office of trustee upon the date of the order of appointment by the clerk unless the will provides otherwise.

(c) If the will does not name or identify a substitute trustee in case of renunciation, and it appears that a substitute trustee should be appointed, the clerk shall appoint some fit and suitable person or corporation as substitute trustee. If the will does not name or identify a substitute trustee, but contains provisions regarding the selection of a substitute trustee, such provisions shall be complied with unless the clerk determines that such provisions would result in the selection of an unfit or unsuitable trustee. A substitute trustee so appointed shall succeed to the office of trustee upon the date of the order of appointment unless the will provides otherwise.

(d) A substitute trustee shall, upon succeeding to the office of trustee, unless the will provides otherwise, have such powers and duties and be vested with the title to the property included in the trust, as if the substitute trustee had been originally named in the will.

(e) Each notice required by this section shall be written notice, and shall identify the proceeding and apprise the person to be notified of the nature of the action to be taken. Service of such notice may be in the same manner as is provided for service of notice in civil actions, or by mailing the notice to the person to be notified at his last known address. Service of the notice must be completed not less than ten days prior to the date the hearing is held or the action is taken. Service by mail shall be complete upon deposit of the notice enclosed in a postpaid, properly

addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office Department.

(f) The clerk of superior court shall docket, record, and index all proceedings pursuant to this section in the same manner as special proceedings, and shall also enter with the recorded will a notation that the trustee has renounced and a reference to the book and page number, file, or other place where the record may be found. (1967, c. 99.)

Editor's Note.——The act adding this section is effective Oct. 1, 1967.

Article 4.

Charitable Trusts.

§ 36-23.1. Gifts, etc., for religious, educational, charitable or benevolent uses or purposes.

The General Assembly acted within its competence in enacting this section. Banner v. North Carolina Nat'l Bank, 266 N.C. 337, 146 S.E.2d 89 (1966).

§ 36-23.2. Charitable Trusts Administration Act.—(a) If a trust for charity is or becomes illegal, or impossible or impracticable of fulfillment or if a device or bequest for charity, at the time it was intended to become effective is illegal, or impossible or impracticable of fulfillment, and if the settlor, or testator, manifested a general intention to devote the property to charity, any judge of the superior court may, on application of any trustee, executor, administrator or any interested party, or the Attorney General, order an administration of the trust, devise or bequest as nearly as possible to fulfill the manifested general charitable intention of the settlor or testator. In every such proceeding, the Attorney General, as representative of the public interest, shall be notified and given an opportunity to be heard. This section shall not be applicable if the settlor or testator has provided, either directly or indirectly, for an alternative plan in the event the charitable trust, devise or bequest is or becomes illegal, impossible or impracticable of fulfillment. However, if the alternative plan is also a charitable trust or devise or bequest for charity and such trust, devise or bequest for charity fails, the intention shown in the original plan shall prevail in the application of this section.

(b) The words "charity" and "charitable," as used in this section shall include, but shall not be limited to, any eleemosynary, religious, benevolent, educational, scientific, or literary purpose. (1967, c. 119.)

Editor's Note.—The act adding this section is effective Oct. 1, 1967.

For comment on this section, see 46 N.C.L. Rev. 1020 (1968).

Section Based on Model Act. — This section is based largely upon the Model Act Concerning the Administration of Charitable Trusts, Devises and Bequests, which was prepared by the National Conference of Commissioners on Uniform State Laws. Special Report of the General Statutes Commission on Chapter 119, Session Laws 1967.

It Sanctions and Defines Public Policy. —It has long been a strong public policy that, if possible, gifts for charitable purposes should not fail because of unforeseen events, but that the courts should assist in carrying out charitable purposes. This section lends statutory sanction and definition to that policy. Special Report of the General Statutes Commission on Chapter 119, Session Laws 1967.

Purpose. — This section will meet the problem which exists when the person who creates a charitable trust, bequest or devise is dead or otherwise unable to modify the gift to meet unforseen changes in the circumstances. Special Report of the General Statutes Commission on Chapter 119, Session Laws 1967.

Scope. — This section applies only to cases of charitable gifts, created by trust or will, which fail, and not to trusts, devises or bequests created for private purposes. Special Report of the General Statutes Commission on Chapter 119, Session Laws 1967.

The application of this section is limited to those cases in which no provision for an alternative plan has been made, and a person creating a charitable trust, be-

quest or devise is free, as he has always been, to provide for the disposition of the property and prevent the court's having to make the determination. Special Report of the General Statutes Commission on Chapter 119, Session Laws 1967.

"Charity" and "Charitable".—The definition of the words "charity" and "charitable" is not limited to those particular purposes listed in this section. Special Report of the General Statutes Commission on Chapter 119, Session Laws 1967.

ARTICLE 5.

Uniform Trusts Act.

§ 36-28. Trustee buying from or selling to self.

The purpose of this section is to clarify and strengthen rules regarding loyalty by a trustee to the interests of his cestuis que trust. Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967).

Court May Relieve Trustee of Restriction of This Section.—Section 36-42, by allowing a court of competent jurisdiction to relieve the trustee of "any or all of the duties and restrictions" placed upon him by this article, gives statutory authority to the court to relieve the trustee of the restriction that he cannot purchase property from the trust. Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967).

Recognizing and reaffirming the stern rule of equity that a trustee cannot be both vendor and vendee, there are rare and justifiable exceptions when the court, in the exercise of its inherent equitable powers, may authorize a purchase of trust property by the trustee, upon full findings of fact that (1) complete disclosure of all facts was made by the trustee, (2) the sale would materially promote the best interests of the trust and its beneficiaries, and (3) there are no other purchasers willing to pay the same or a greater price than offered by the trustee. Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967).

§ 36-35. Contracts of trustee.

Protection of Beneficiaries of Charitable Trusts. — The State as parens partriae, through its Attorney General, has the common-law right and power to protect the beneficiaries of charitable trusts and the property to which they are or may be entitled. Sigmund Sternberger Foundation v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968).

Enforcement of Gift or Trust.—Because of the public interest necessarily involved in a charitable trust or gift to charity and essential to its legal classification as a charity, it is generally recognized that the Attorney General, in his capacity as representative of the State and of the public, is the, or at least a, proper party to institute and maintain proceedings for the enforcement of such a gift or trust. Sigmund Sternberger Foundation v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968).

§ 36-42. Power of the court.

Court May Relieve Trustee of Restriction on Purchasing Trust Property.—This section, by allowing a court of competent jurisdiction to relieve the trustee of "any or all of the duties and restrictions" placed upon him by this article, gives statutory authority to the court to relieve the trustee of the restriction that he cannot purchase property from the trust. Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967).

Chapter 38.
Boundaries.

§ 38-1. Special proceeding to establish.

Purpose of Processioning.—
In accord with 2nd paragraph in original. See Coley v. Morris Tel. Co., 267 N.C. 701, 149 S.E.2d 14 (1966).

Quoted in Johnson v. Daughety, 270 N.C. 762, 155 S.E.2d 205 (1967).

Cited in Gahagan v. Gosnell, 270 N.C. 117, 153 S.E.2d 879 (1967); Vail v. Smith, 1 N.C. App. 498, 162 S.E.2d 78 (1968).

§ 38-2. Occupation sufficient ownership.

Quoted in Johnson v. Daughety, 270 N.C. 762, 155 S.E.2d 205 (1967).

§ 38-3. Procedure.—(a).

Applicability of Section.—The procedure prescribed by this section is applicable only in case of a dispute as to the true location of the boundary line between adjoining landowners. Johnson v. Daughety, 270 N.C. 762, 155 S.E.2d 205 (1967).

Burden of Proof.—
In accord with 3rd paragraph in original. See Coley v. Morris Tel. Co., 267 N.C. 701, 149 S.E.2d 14 (1966).

If the plaintiffs are unable to show by the greater weight of evidence the location of the true dividing line at a point more favorable to them than the line as contended by the defendants, the jury should answer the issue in accord with the contentions of the defendants. Coley v. Morris Tel. Co., 267 N.C. 701, 149 S.E.2d 14 (1966).

Questions of Law and Fact.—
In accord with original. See Coley v. Morris Tel. Co., 267 N.C. 701, 149 S.E.2d 14 (1966).

A description contained in a junior conveyance cannot be used to locate the lines called for in a prior conveyance. The location of the lines called for in the prior conveyance is a question of fact to be ascertained from the description there given. Coley v. Morris Tel. Co., 267 N.C. 701, 149 S.E.2d 14 (1966).

§ 38-4. Surveys in disputed boundaries.—(a) When in any action or special proceeding pending in the superior court the boundaries of lands are drawn in question, the court may, if deemed necessary, order a survey of the lands in dispute, in accordance with the boundaries and lines expressed in each party's titles, and such other surveys as shall be deemed useful.

(b) Surveys pursuant to this section shall be made by one surveyor appointed by the court, unless the court, in its discretion, determines that additional surveyors are necessary. The surveyor or surveyors shall proceed according to the order of the court, and make the surveys and as many plats thereof as shall be ordered.

(c) Upon the request of any party to the action or special proceeding, the court shall call such surveyor or surveyors as the court's witn ss, and any party to such action or proceeding shall have the privilege of direct examination, cross-examination, and impeachment of such witness. The fact that such witness is called by the court shall not change the weight, effect or admissibility of the testimony of such witness, and upon the request of any party to the suit, the court shall so instruct the jury.

(d) The court shall make an allowance for the fees of the surveyor or surveyors and they shall be taxed as a part of the costs. The court may, in its discretion, require the parties to make a deposit to secure the payment of such fees, and may, in its discretion, provide for the payment of such fees prior to the termination of the suit. (1779, c. 157; 1786, c. 252; R. C., c. 31, s. 119; Code, c. 939; Rev., s. 1504; C. S., s. 364; 1967, c. 33.)

Editor's Note.—The 1967 amendment, effective Oct. 1, 1967, rewrote this section.

Better Practice Is to Order Survey.—While this section does not require the court to order a survey of the lands in

dispute when the boundaries of lands are in question, it is the better practice to do so. Smothers v. Schlosser, 2 N.C. App. 272, 163 S.E.2d 127 (1968).

Cited in York Indus. Center v. Michigan Mut. Liab. Co., 271 N.C. 158, 155 S.E.2d 501 (1967).

Chapter 39.

Conveyances.

Article 1.

Construction and Sufficiency.

Article 2.

Conveyances by Husband and Wife.

Article 3.

Fraudulent Conveyances.

Article 1.

Construction and Sufficiency.

§ 39-1. Fee presumed, though word "heirs" omitted.

Editor's Note.—

For case law survey as to real property, see 45 N.C.L. Rev. 964 (1967).

For article on "Doubt Reduction Through Conveyancing Reform — More Suggestions in the Quest for Clear Land Titles," see 46 N.C.L. Rev. 284 (1968).

§ 39-1.1. In construing conveyances court shall give effect to intent of the parties.—(a) In construing a conveyance executed after January 1, 1968, in which there are inconsistent clauses, the courts shall determine the effect of the instrument on the basis of the intent of the parties as it appears from all of the provisions of the instrument.

(b) The provisions of subsection (a) of this section shall not prevent the application of the rule in Shelley's case. (1967, c. 1182.)

Editor's Note.—Session Laws 1967, c. 1182, adding this section, is effective Jan. 1, 1968.

For comment on the rule in Shelley's case, see 4 Wake Forest Intra. L. Rev. 132 (1968).

§ 39-6. Revocation of deeds of future interests made to persons not in esse.

Cited in Starling v. Taylor, 1 N.C. App. 287, 161 S.E.2d 204 (1968).

Article 2.

Conveyances by Husband and Wife.

§ 39-13.1. Validation of certain deeds, etc., executed by married women without private examination.—(a) No deed, contract, conveyance, leasehold or other instrument executed since the seventh day of November, one thousand nine hundred and forty-four, shall be declared invalid because of the failure to take the private examination of any married woman who was a party to such deed, contract, conveyance, leasehold or other instrument.

(b) Any deed, contract, conveyance, lease or other instrument executed prior to February 7, 1945, which is in all other respects regular except for the failure to take the private examination of a married woman who is a party to such deed, contract, conveyance, lease or other instrument is hereby validated and confirmed to the same extent as if such private examination had been taken, pro-

vided that this section shall not apply to any instruments now involved in any pending litigation. (1945, c. 73, s. 21½; 1969, c. 1008, s. 1.)

Editor's Note. — The 1969 amendment designated the former provisions of this section as subsection (a) and added subsection (b). Section 3 of the amendatory act provides that the act shall not affect pending litigation.

§ 39-13.3. Conveyances between husband and wife.

Editor's Note.—
For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966).

Quoted in Council v. Pitt, 272 N.C. 222, 158 S.E.2d 34 (1967).

§ 39-13.5. Creation of tenancy by entirety in partition of real property.—When either a husband or a wife owns an undivided interest in real property as a tenant in common with some person or persons other than his or her spouse and there occurs an actual partition of the property, a tenancy by the entirety may be created in the husband or wife who owned the undivided interest and his or her spouse in the manner hereinafter provided:

(1) In a division by cross-deed or deeds, between or among the tenants in common provided that the intent of the tenant in common to create a tenancy by the entirety with his or her spouse in this exchange of deeds must be clearly stated in the granting clause of the deed or deeds to such tenant and his or her spouse, and further provided that whenever the tenant in common is a married woman, the deed or deeds to such tenant and her spouse is signed by them and is acknowledged before a certifying officer who shall make a private examination of the married woman in accordance with G.S. 52-6; or

(2) In a judicial proceeding for partition. In such proceeding, both spouses have the right to become parties to the proceeding and to have their pleadings state that the intent of the tenant in common is to create a tenancy by the entirety with his or her spouse. The order of partition shall provide that the real property assigned to such tenant and his or her spouse shall be owned by them as tenants by the entirety; provided that whenever the tenant in common is a married woman, the pleading showing her intent to create a tenancy by the entirety is acknowledged before a certifying officer who shall make the private examination of the married woman in accordance with G.S. 52-6. (1969, c. 748, s. 1.)

Editor's Note. — Session Laws 1969, c. 748, s. 3, makes the act effective Oct. 1, 1969.

Article 3.

Fraudulent Conveyances.

§ 39-15. Conveyance with intent to defraud creditors void.

I. GENERAL CONSIDERATION.

Editor's Note.—
For a discussion of the constructive trust as a remedy for the defrauded creditor, see 45 N.C.L. Rev. 424 (1967).

§ 39-17. Voluntary conveyance evidence of fraud as to existing creditors.

Holder of Bearer Note Secured by Deed of Trust Held Not Necessary Party.— Where the note which a deed of trust purports to secure is payable to bearer, the plaintiff alleges it is "a false and fictitious paper-writing" and that the identity of the supposed bearer "remains unknown to plaintiff," the trustee in the deed of trust which purports to secure the payment of such note is a party to the action and has participated actively in its defense, whatever may be the situation where the holder of the indebtedness is named in the deed of trust and known, the holder of

the alleged note cannot be deemed a necessary party to the action to set aside the deed of trust which purports to secure it. Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

Presumptions, etc.—

The effect of this section is to destroy any presumption of vitiating fraud in the making of a voluntary gift or settlement solely from the indebtedness of the donor or settler, and to make the failure to retain property fully sufficient and available for the satisfaction of creditors a requisite of such presumption. Hood v. Cobb, 207 N.C. 128, 176 S.E. 288 (1934); Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

Even though it is shown that a conveyance by a debtor was voluntary (that is, not for value), the burden of proof is, nevertheless, upon the plaintiff to show that the grantor did not retain property sufficient to pay his debts. Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

Earlier decisions of the Supreme Court were to the effect that, notwithstanding this section, there was a presumption of fraudulent intent in the case of a voluntary conveyance by a debtor and the burden rested upon the party seeking to uphold the voluntary conveyance to show retention by the grantor of property sufficient to pay his then debts. These cases may no longer be regarded as correct statements of the law of this jurisdiction with regard to the question of which party must ultimately bear the burden of proof upon the question of retention by the grantor of sufficient property to pay his then existing debts. That burden is now placed upon the party attacking the conveyance. Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

Evidence of Tax Valuation, etc.—

If, in order to survive a motion for judgment of nonsuit, the plaintiff must offer evidence sufficient in itself to show that its debtors, the defendant grantors in the deed of trust, did not retain property sufficient to pay their indebtedness to the plaintiff (no other debts being shown in the record), the judgment of nonsuit must be sustained where the only evidence offered by the plaintiff, upon this point, consisted of the tax listings by such defendants of their tangible properties in a particular county. Such tax listings do not negative the possibilities that these defendants, after executing the deed of trust in question, retained, and still retain, bank accounts or other intangible properties in the county or elsewhere, or tangible property, real or personal, located in another county, sufficient to pay the claim of the plaintiff and whatever other indebtedness these defendants may owe. Therefore, the evidence introduced by the plaintiff is not sufficient, alone, to show that the defendant grantors did not retain property sufficient to pay their debts when they executed the deed of trust now under attack. Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

Evidence Sufficient to Carry Issue of Intent to Jury.—Though the ultimate burden of proof rests upon the plaintiff to show either actual intent by the defendant grantors to defraud their creditors or failure by them to retain property sufficient to pay their then existing debts, when the plaintiff introduces an admission by the defendants that their deed of trust was "voluntary," and introduces evidence that they were then indebted to the plaintiff, which debt has not been paid, this is evidence tending to show an intent to delay, hinder, and defraud creditors sufficient to carry the case to the jury for its determination of the issue, and a judgment of nonsuit is improperly granted. Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

§ **39-23**: Repealed by Session Laws 1965, c. 700, s. 2, effective at midnight June 30, 1967.

ARTICLE 7.

Uniform Vendor and Purchaser Risk Act.

§ 39-39. Risk of loss.

Editor's Note.—For article on options to purchase real property in North Carolina, see 44 N.C.L. Rev. 63 (1965).

Chapter 40.

Eminent Domain.

Article 2.

Condemnation Proceedings.

Article 1.

Right of Eminent Domain.

§ 40-1. Corporation in this chapter defined.

Editor's Note.—

For case law survey as to eminent domain, see 44 N.C.L. Rev. 941, 1003 (1966). For an article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

For note on expansion of definition of "taking" in eminent domain proceedings, see 47 N.C.L. Rev. 441 (1969).

Applied in City of Durham v. Eastern Realty Co., 270 N.C. 631, 155 S.E.2d 231 (1967).

§ 40-2. By whom right may be exercised.

I. GENERAL CONSIDERATION.

Editor's Note.—

For note on public use in North Carolina, see 44 N.C.L. Rev. 1142 (1966).

Founded on Necessity.—

Public necessity alone justifies governmental taking of private property. State Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

Cited in Hughes v. North Carolina State Highway Comm'n, 2 N.C. App. 1, 162 S.E.2d 661 (1968).

II. NATURE AND PURPOSE.

The use which will justify the taking of private property under the exercise of the right of eminent domain is the use by or for the government, the general public, or some portion thereof as such, and not the use by or for particular individuals or for the benefit of particular estates. The use, however, may be limited to the inhabitants of a small locality, but the benefit must be in common. State Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

"Public use," as applied in the exercise of the power of eminent domain, is not capable of a precise definition applicable to all situations. The term is elastic, and keeps pace with changing conditions, since the progressive demands of society and changing concepts of governmental duties and functions are constantly bringing new subjects forward as being for "public use." State Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

Question for Court.—In any proceeding for condemnation under the sovereign power of eminent domain, what is a public use is a judicial question for ultimate decision by the court as a matter of law, reviewable upon appeal. State Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

Scenic Value of Road May Be Considered.—The scenic value of a road and its necessity as a part of the system of scenic highways for the public may be considered in determining whether taking over the road is for a public or private purpose. State Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

IV. TO WHOM GRANTED.

Municipalities Operating Water and Sewer Systems.—This chapter confers the right of eminent domain upon municipalities operating water and sewer systems. If such corporation is unable to agree with a landowner for the purchase of land it needs for such purpose, it may acquire the land, or an easement therein, by following the procedure there set forth. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

V. COMPENSATION ESSENTIAL.

Necessity for Compensation.—

In the exercise of the sovereign power of eminent domain, private property can be taken only for a public use and upon the payment of just compensation. State Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

§ 40-3. Right to enter on and purchase lands.

Opinions of Attorney General. — Mr. James R. Taylor, Executive Director, Statesville Housing Authority, 9/9/69.

§ 40-5. Condemning land for industrial sidings. — Any railroad company doing business in this State, whether such railroad be a domestic or foreign corporation, which has been or shall be ordered by the Utilities Commission to construct an industrial siding as provided in § 62-232, is empowered to exercise the right of eminent domain for such purpose, to condemn property as provided in this chapter, and to acquire such right-of-way as may be necessary to carry out the orders of the Utilities Commission. Whenever it is necessary for any railroad company doing business in this State to cross the street or streets in a town or city in order to carry out the orders of the Utilities Commission, to construct an industrial siding, the power is hereby conferred upon such railroad company to occupy such street or streets of any such town or city within the State: Provided, license so to do be first obtained from the board of aldermen, board of commissioners, or other governing authorities of such town or city. (1911, c. 203; C. S., s. 1709; 1933, c. 134, s. 8; 1941, c. 97, s. 1; 1969, c. 723, s. 1.)

Editor's Note. — The 1969 amendment, effective Sept. 15, 1969, substituted "§ 62-232" for "§ 62-45" near the beginning of the section.

ARTICLE 2.

Condemnation Proceedings.

§ 40-11. Proceedings when parties cannot agree.

Proceedings Instituted, etc.—

This section provides that before the right of eminent domain accrues to the condemnor thereunder, there must exist an inability to agree for the purchase price. This has been held to be a preliminary jurisdictional fact in eminent domain proceedings under this chapter. State Highway Comm'n v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968).

Landowner may not maintain proceeding under this chapter unless there has been a taking under the power of eminent domain. Hughes v. North Carolina State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

The basic prerequisites to a redevelopment commission's gaining authority to exercise power of eminent domain are now, and at all times have been, the prerequisite procedures required by this article, and chapter 160, article 37, with the modifications as now set out in § 160-465. Redevelopment Comm'n v. Abeyounis, 1 N.C. App. 270, 161 S.E.2d 191 (1968).

Editor's Note.—

For an article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

Applied in Carolina Power & Light Co. v. Briggs, 268 N.C. 158, 150 S.E.2d 16 (1966); Prestige Realty Co. v. State Highway Comm'n, 1 N.C. App. 82, 160 S.E.2d 83 (1968).

Cited in Hughes v. North Carolina State Highway Comm'n, 2 N.C. App. 1, 162 S.E.2d 661 (1968).

§ 40-12. Petition filed; contains what; copy served.

What Petition Must Allege.—

In accord with 3rd paragraph in original. See State Highway Comm'n v. Phillips, 267 N.C. 369, 148 S.E.2d 282 (1966).

By the very terms of this section the petition must state in detail the nature of the public business and the specific use to which the land will be put. These allegations are as much jurisdictional in their character as is an allegation of the fact that the petitioner and the respondents have been unable to agree. Redevelopment Comm'n v. Abeyounis, 1 N.C. App. 270, 161 S.E.2d 191 (1968); State Highway Comm'n v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968).

Description of Property, etc.—

When the condemnor seeks to follow the procedure permitted by statute, his petition must contain a description of the property actually in litigation, and not merely a description of the entire tract.

The property must "first be located." Hughes v. North Carolina State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

Ordinarily, proceedings under this chapter are instituted by the condemnor by petition containing an accurate description of the property which it seeks to condemn, thereby placing the landowner on the defendant's side of the indexes and cross-indexes of the public records and furnishing accessible means by which the property may be identified. Hughes v. North Carolina State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

Landowner Has Right to Answer and a Hearing.—It is apparent that this section and § 40-16 do not contemplate a perfunctory proceeding, leading automatically to the granting of the petition. They do not contemplate a landowner standing helpless before the demand of a unit of government. He may deny any of the allegations in the petition and is entitled to a hearing before commissioners are appointed to appraise the damages he will sustain if his property is taken. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Applied in Hughes v. North Carolina State Highway Comm'n, 2 N.C. App. 1, 162 S.E.2d 661 (1968).

§ 40-12.1. Notice of proceedings. — Notice of all proceedings brought hereunder shall be filed with the clerk of superior court of each county in which any part of the real estate is located in the form and manner provided by G.S. 1-116, and the clerk shall index and cross-index this notice as required by G.S. 1-117, provided the clerk shall always index the name of the condemnor in the record of lis pendens and in the judgment docket as required by G.S. 2-42 as the plaintiff and the name of the property owner or property owners as the defendants irrespective of whether the condemning party is the plaintiff or defendant. The filing of such notice shall be constructive notice of the proceeding to any person who subsequently acquires any interest in or lien upon said property, and the condemnor shall take all property condemned under this article free of the claims of any such person. (1969, c. 864.)

§ 40-16. Answer to petition; hearing; commissioners appointed.

Landowner Has Right to Answer and a Hearing.—See same catchline in note to § 40-12.

Where Only Issue of Just Compensation Is Raised.—Where the answer does not deny the right of the city to acquire the desired easements by condemnation and raises no issue save that of just compensation, the only matter to be determined by the clerk at the initial hearing is the selection and appointment of the commissioners and the fixing of the time and place for their first meeting. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Clerk Is to Hold Hearing, etc.—

In accord with original. See City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

All motions made before the clerk, other than those grantable as a matter of course or those specifically provided for by law, require notice to the parties affected thereby. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

The statutory procedure is designed to provide to the landowner a fair determination of his damages. It would be converted into a farce if it were construed to permit the clerk to appoint commissioners, the commissioners to meet, to determine the damages and report the same to the clerk, and the clerk twenty days later to enter a final judgment, all with no notice whatever to the landowner, other than the original summons in the proceedings, and all before the time for filing his answer, as extended by the clerk, expired. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Effect of Notice of Hearing.—If the landowner is given notice of the hearing before the clerk, this would, no doubt, be sufficient to charge him with notice of an order entered by the clerk, at such hearing, appointing commissioners and fixing the time and place for their first meeting. In turn, this would charge him with notice of actions of the commissioners at such first meeting, including the adjournment of such meeting to another time and place. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

§ 40-17. Powers and duties of commissioners.

The method prescribed by this chapter for arriving at compensation for condemnation of land for highway purposes is open to the landowner as well as to

the Highway Commission. Hughes v. North Carolina State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

General Benefits.—

In determining the compensation to be paid to the landowner, account must be taken of benefits to his property from the construction of the proposed improvement. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

General benefits are those which arise from the fulfillment of the public object which justified the taking. State Highway Comm'n v. Mode, 2 N.C. App. 464, 163 S.E.2d 429 (1968).

Special Benefits. — Special benefits are those which arise from the peculiar relation of the land in question to the public improvement. State Highway Comm'n v. Mode, 2 N.C. App. 464, 163 S.E.2d 429 (1968).

Notice to Parties.—

This statute contemplates notice to the landowner of the meeting of the commissioners at which they are to "hear" his proofs and allegations. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

The statutory procedure is designed to provide to the landowner a fair determination of his damages. It would be converted into a farce if it were construed to permit the clerk to appoint commissioners, the commissioners to meet, to determine the damages and report the same to the clerk, and the clerk twenty days later to enter a final judgment, all with no notice whatever to the landowner, other than the original summons in the proceedings, and all before the time for filing his answer, as extended by the clerk, expired. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

If the landowner is given notice of the hearing before the clerk, this would, no doubt, be sufficient to charge him with notice of an order entered by the clerk, at such hearing, appointing commissioners and fixing the time and place for their first meeting. In turn, this would charge him with notice of actions of the commissioners at such first meeting, including the adjournment of such meeting to another time and place. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Report Failing to Show Hearing.—A commissioners' report that simply states that the commissioners met on a certain day in the office of the clerk and "subsequently visited the premises of the defendant, and after taking into full consideration the quality and quantity of the land involved, and all inconveniences likely to result to the defendant from the condemnation of said rights-of-way," asserted the damages at zero, does not purport to show any hearing by the commissioners of "the proofs and allegations of the parties," as required both by the statute and by the order of the clerk. City of Randelman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Additional Burdens.—

Where a city proposes to lay the sewer and water lines in the right-of-way of a state highway, the owner of the fee in this land is entitled to just compensation for an additional burden beyond that of the original easement for the highway. The laying of a water main or sewer line in the right-of-way of a highway is an additional burden upon the owner of the fee. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Compensation for Land Containing Stone Deposit. — See State Highway Comm'n v. Mode, 2 N.C. App. 464, 163 S.E.2d 429 (1968).

Compensation for Land Containing Mineral Deposits. — See State Highway Comm'n v. Mode, 2 N.C. App. 464, 163 S.E.2d 429 (1968).

§ 40-19. Exceptions to report; hearing; appeal; when title vests; restitution.—Within twenty days after filing the report the corporation or any person interested in the said land may file exceptions to said report, and upon the determination of the same by the court, either party to the proceedings may appeal to the court at term, and thence, after judgment, to the appellate division. The court or judge on the hearing may direct a new appraisal, modify or confirm the report, or make such order in the premises as to him shall seem right and proper. If the said corporation, at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then and in that event the said corporation may enter, take possession of, and hold said lands, notwithstanding the pendency of the appeal, and until the final judgment rendered on said appeal. And if there shall be no appeal, or if the final judgment rendered upon said petition and proceedings shall be in favor of the corporation, and upon the pay-

ment by said corporation of the sum adjudged, together with the costs and counsel fees allowed by the court, into the office of the clerk of the superior court, then and in that event all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such easement in such real estate during the corporate existence of the corporation aforesaid or if the proceedings have been instituted by such corporation to acquire a fee simple title to such real estate, then all persons who have been made parties to the proceedings shall be divested and barred of all right, title and interest in such real estate. The original of such judgment or a certified copy thereof, such original or certified copy to be under the seal of the court if recorded outside the county in which the court rendering the judgment is located, shall be registered in the county where the land is situated, and the original judgment or a certified copy thereof or a certified copy of the registered instrument may be given in evidence in all actions and proceedings as deeds for land are now allowed to be read in evidence. All real estate acquired by any corporation under and pursuant to the provisions of this chapter for its purposes shall be deemed to be acquired for the public use. But if the court shall refuse to condemn the land, or any portion thereof, to the use of such corporation, then, and in that event, the money paid into court, or so much thereof as shall be adjudged, shall be refunded to the corporation. And the corporation shall have no right to hold said land not condemned, but shall surrender the possession of the same, on demand, to the owner or owners, or his or their agent or attorney. And the court or judge shall have full power and authority to make such orders, judgments and decrees, and issue such executions and other process as may be necessary to carry into effect the final judgment rendered in such proceedings. If the amount adjudged to be paid the owner of any property condemned under this chapter shall not be paid within one year after final judgment in the proceeding, the right under the judgment to take the property or rights condemned shall ipso facto cease and determine, but the claimant under the judgment shall still remain liable for all amounts adjudged against him except the consideration for the property. (Code, s. 1946; 1893, c. 148; Rev., s. 2587; 1915, c. 207; C. S., s. 1723; 1951, c. 59, s. 2; 1955, c. 29, s. 1; 1969, c. 44, s. 47.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" at the end of the first sentence.

Strict Construction. — The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed. Greensboro-High Point Airport Authority v. Irvin, 2 N.C. App. 341, 163 S.E.2d 118 (1968).

Landowner Has Right to File Exceptions and Be Heard.—The landowner has the right to file exceptions to the report of the commissioners within twenty days after the report is filed. He is entitled to be heard upon his exceptions. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Clerk to Make Determination, etc.—The statutory procedure is designed to provide to the landowner a fair determination of his damages. It would be converted into a farce if it were construed to permit the clerk to appoint commissioners, the commissioners to meet, to determine the damages and report the same to the clerk, and the clerk twenty days later to enter a final judgment, all with no notice whatever to the landowner, other than the original summons in the proceedings, and all before the time for filing his answer, as extended by the clerk, expired. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Temporary possession, pendente lite, subject to removal by final adverse judgment, is quite different from a final judicial determination that the condemnor is entitled as a matter of right to permanent possession. Greensboro-High Point Airport Authority v. Irvin, 2 N.C. App. 341, 163 S.E.2d 118 (1968).

Title Is Not Divested, etc.—In accord with original. See Greensboro-High Point Airport Authority v. Irvin, 2 N.C. App. 341, 163 S.E.2d 118 (1968).

Property Involved in Voluntary Sale as Guide to Value.—Whether property involved in a voluntary sale is sufficiently similar in nature, location, and condition to the property appropriated by condemnation to admit evidence of its sale and the price paid therefor as a guide to the value of the condemned property, is a question to be determined by the trial judge in the

exercise of his sound discretion. Redevelopment Comm'n v. Denny Roll & Panel Co., 273 N.C. 368, 159 S.E.2d 861 (1968).

The issue as to amount of compensation is for determination de novo by jury trial in the superior court. Redevelopment Comm'n v. Smith, 272 N.C. 250, 158 S.E.2d 65 (1967); Redevelopment Comm'n v. Denny Roll & Panel Co., 273 N.C. 368, 159 S.E.2d 861 (1968).

Interest from Date Petitioner Entitled to Possession.—Respondents, in an action to take land under eminent domain, are entitled to interest from the date the petitioner acquires the right to possession and not from the date the proceedings were instituted. Carolina Power & Light Co. v. Briggs, 268 N.C. 158, 150 S.E.2d 16 (1966).

Recordari Properly Denied.—The landowner must file exceptions to the final report of the commissioners within twenty days after the report is filed, with right to appeal to the superior court at term, and when the landowner files no exceptions and does not appeal from the order of confirmation by the clerk, recordari to the superior court is properly denied when the application therefor merely alleges merit without specifying facts supporting this conclusion, fails to negate laches, and the application is not made to the next succeeding term of the superior court. Redevelopment Comm'n v. Capehart, 268 N.C. 114, 150 S.E.2d 62 (1966).

Denial of Vacation of Confirmation May Not Be Affirmed on Ground Additional Appraisals Will Not Give Recovery.—The court may not affirm the clerk's denial of a motion to vacate the judgment of confirmation on the ground that there is no reasonable probability that any additional appraisals, hearings, or trials would result in any recovery on the part of the defendant. Under the statutes, that is not for the court below or for the Supreme Court to determine. That can be determined only by commissioners who are appointed after the notice and hearing contemplated by § 40-16 and who thereupon proceed as directed by § 40-17. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

§ 40-20. Provision for jury trial on exceptions to report.

Strict Construction. — The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed. Redevelopment Comm'n v. Abeyounis, 1 N.C. App. 270, 161 S.E.2d 191 (1968).

The only question for determination by the jury is the issue of just compensation. Redevelopment Comm'n v. Abeyounis, 1 N.C. App. 270, 161 S.E.2d 191 (1968).

The issue as to the amount of compensation is for determination de novo by jury trial in the superior court. Redevelopment Comm'n v. Smith, 272 N.C. 250, 158 S.E.2d 65 (1967); Redevelopment Comm'n v. Denny Roll & Panel Co., 273 N.C. 368, 159 S.E.2d 861 (1968).

Property Involved in Voluntary Sale as Guide to Value.—Whether property involved in a voluntary sale is sufficiently similar in nature, location, and condition to the property appropriated by condemnation to admit evidence of its sale and the price paid therefor as a guide to the value of the condemned property, is a question to be determined by the trial judge in the exercise of his sound discretion. Redevelopment Comm'n v. Denny Roll & Panel Co., 273 N.C. 368, 159 S.E.2d 861 (1968).

§ 40-26. Change of ownership pending proceeding.

The proceedings by this section are constituted a lis pendens. Hughes v. North Carolina State Highway Comm'n, 2 N.C. App. 1, 162 S.E.2d 661 (1968).

Applied in Hughes v. North Carolina State Highway Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

ARTICLE 3.

Public Works Eminent Domain Law.

§ 40-30. Title of article.

Editor's Note.—

For an article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

§ 40-33. Institution of proceedings; venue; immediate hearing; entry upon land by petitioner.

Opinions of Attorney General. — Mr. James R. Taylor, Executive Director, Statesville Housing Authority, 9/9/69.

§ 40-37. Determination of issues raised by objections; waiver by failure to file; final judgment; guardian ad litem.

Discretion of Commissioners.— In accord with original. See Philbrook v. Chapel Hill Housing Authority, 269 N.C. 598, 153 S.E.2d 153 (1967).

§ 40-38. Appointment of special master. — The court, at the time of said hearing, shall appoint a special master to fix the amount of damages and compensation for the taking and condemnation of the property described in the petition and the persons entitled thereto, and to report thereon to the court. The special master shall be a disinterested person not related to anyone having an interest in or lien upon the property sought to be condemned. The compensation of said special master shall be fixed by the court. The special master immediately after his appointment shall subscribe to an oath that to the best of his ability he will truly find and return the compensation for the taking and condemnation of the property and the persons entitled thereto. (1935, c. 470, s. 9; 1969, c. 1016.)

Editor's Note. — The 1969 amendment rewrote the third sentence.

Chapter 41.

Estates.

§ 41-1. Fee tail converted into fee simple.

I. GENERAL CONSIDERATION.

Editor's Note.—

For case law survey as to real property, see 45 N.C.L. Rev. 964 (1967).

"Heirs of their bodies," etc.—

When the term "heirs of the body" is used in its technical sense, it imports a class of persons to take indefinitely in succession, from generation to generation. Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967).

II. RULE IN SHELLEY'S CASE.

Editor's Note.—

For case law survey as to the rule in Shelley's case, see 44 N.C.L. Rev. 1036 (1966).

For comment on the rule in Shelley's case, see 4 Wake Forest Intra. L. Rev. 132 (1968).

Statement of Rule.—

In accord with original. See Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

The rule in Shelley's case says, in substance, that if an estate of freehold be limited to A, with remainder to his heirs, general or special, the remainder, although importing an independent gift to the heirs, as original takers, shall confer the inheritance on A, the ancestor. Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967).

Nature and Operation, etc.—

The rule in Shelley's case operates as a rule of property without regard to the intent of the grantor or devisor. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

The rule in Shelley's case applies to personalty as well as to realty. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

Whenever applicable, the rule in Shelley's case applies to both real and personal property in this jurisdiction. Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967).

Difference between Words of Purchase and Words of Limitation.—In considering the applicability of the rule in Shelley's case, it is important to draw and constantly keep in mind the difference between words of purchase and words of limita-

tion. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

When the rule in Shelley's case says that the words "heirs" or the "heirs of the body" of A are words of limitation and not words of purchase, it simply means that "heirs" or the "heirs of the body" refer to and are read in connection with the estate given to A, extending or modifying that estate, and are not taken as describing a group to whom an estate will first attach. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

"Heirs" or "Heirs of Body."—The rule in Shelley's case applies whenever judicial exposition determines that heirs are described, though informally, under a term correctly descriptive of other objects, but stands excluded whenever it determines that other objects are described, though informally, under the term heirs. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

III. APPLICATION AND ILLUSTRATIVE CASES.

Conveyance to One and Heirs, etc.—A devise to A for life and at her death to the heirs of her body presents a classic case for application of the rule in Shelley's case. Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967).

By a devise to A for life and at her death to the heirs of her body, the rule in Shelley's case, and the doctrine of merger, give A an estate tail which this section converts into a fee simple. Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967).

Where testatrix devised and bequeathed all her property to her daughter during her lifetime and at her death to the "heirs of her body, if any," with further provision that if the daughter should die before testatrix without heirs of the body, the property should go to named collateral kin, the daughter took a fee tail under the rule in Shelley's case, which was converted into a fee simple by this section. Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967).

Conveyance to One and His Children.—When the devise is to one for life and after his death to his children or issue, the rule in Shelley's case has no application, unless it manifestly appears that such words are used in the sense of heirs generally. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

The use of the word "children," etc.—The word "children" is ordinarily a word of purchase. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

"Or Other Lineal Descendants".—The superadded words "or other lineal descendants . . . to have and to hold the same to them and their heirs, executors and administrators absolutely" do not demonstrate that testator contemplated an indefinite succession from generation to generation. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

§ 41-2. Survivorship in joint tenancy abolished; proviso as to partnership.

I. GENERAL CONSIDERATION.

Editor's Note.—For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966).

§ 41-2.1. Right of survivorship in bank deposits created by written agreement.

(b) A deposit account established under subsection (a) of this section shall have the following incidents:

(1) Either party to the agreement may add to or draw upon any part or all of the deposit account, and any withdrawal by or upon the order of either party shall be a complete discharge of the banking institution with respect to the sum withdrawn.

(2) During the lifetime of both or all the parties, the deposit account shall be subject to their respective debts to the extent that each has contributed to the unwithdrawn account. In the event their respective contributions are not determined, the unwithdrawn fund shall be deemed owned by both or all equally.

(3) Upon the death of either or any party to the agreement, the survivor, or survivors, becomes the sole owner, or owners, of the entire unwithdrawn deposit subject to the claims of the creditors of the deceased and to governmental rights in that portion of the unwithdrawn deposit

which would belong to the deceased had said unwithdrawn deposit been divided equally between both or among all the joint tenants at the time of the death of said deceased.

(4) Upon the death of one of the joint tenants provided herein the banking institution in which said joint deposit is held shall pay to the legal representative of the deceased, or to the clerk of the superior court if the amount is less than one thousand dollars ($1,000.00), in accordance with G.S. 28-68, the portion of the unwithdrawn deposit made subject to the claims of the creditors of the deceased and to governmental rights as provided in subdivision (3) above, and may pay the remainder to the surviving joint tenant or joint tenants. Said legal representative shall hold the portion of said unwithdrawn deposit paid to him and not use the same for the payment of the claims of the creditors of the deceased or governmental rights unless and until all other personal assets of the estate have been exhausted, and shall then use so much thereof as may be necessary to pay any remaining debts of the deceased or governmental claims. Any part of said unwithdrawn deposit not used for the payment of such debts or charges of administration of the deceased shall, upon the settlement of the estate, be paid to the surviving joint tenant or tenants.

(1969, c. 863.)

Editor's Note.—

The 1969 amendment inserted, near the beginning of subdivision (4) of subsection (b), "or to the clerk of the superior court if the amount is less than one thousand dollars ($1,000.00), in accordance with G.S. 28-68."

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966); 46 N.C.L. Rev. 520 (1968).

For note on joint bank accounts with the right of survivorship in North Carolina, see 46 N.C.L. Rev. 669 (1968).

§ 41-2.2. Joint ownership of corporate stock and investment securities. — (a) In addition to other forms of ownership, shares of corporate stock or investment securities may be owned by a husband and wife as joint tenants with rights of survivorship, and not as tenants in common, in the manner provided in this section.

(b) (1) A joint tenancy in shares of corporate stock or investment securities as provided by this section shall exist when such shares or securities indicate that they are owned with the right of survivorship, or otherwise clearly indicate an intention that upon the death of either spouse the interest of the decedent shall pass to the surviving spouse.

(2) Such a joint tenancy may also exist when a broker or custodian holds the shares or securities for the joint tenants and by book entry or otherwise indicates (i) that the shares or securities are owned with the right of survivorship, or (ii) otherwise clearly indicates that upon the death of either spouse, the interest of the decedent shall pass to the surviving spouse. Money in the hands of such broker or custodian derived from the sale of, or held for the purpose of, such shares or securities shall be treated in the same manner as such shares or securities.

(c) Upon the death of a joint tenant his interest shall pass to the surviving joint tenant. The interest of the deceased joint tenant, even though it has passed to the surviving joint tenant, remains liable for the debts of the decedent in the same manner as the personal property included in his estate, and recovery thereof shall be made from the surviving joint tenant when the decedent's estate is insufficient to satisfy such debts.

(d) Nothing herein contained shall be construed to repeal or modify any of

the provisions of G.S. 105-2, G.S. 105-11, and G.S. 105-24, relating to the administration of the inheritance tax laws, or any other provisions of the law relating to inheritance taxes. (1967, c. 864, s. 1; 1969, c. 1115, s. 2.)

Editor's Note.—Prior to the enactment of Session Laws 1969, c. 1115, effective at midnight June 30, 1969, the provisions of the above section were codified as § 25-8-407.

For article on joint ownership of corporate securities in North Carolina, see 46 N.C.L. Rev. 520 (1968).

§ 41-3. Survivorship among trustees.

Cited in In re Michal, 273 N.C. 504, 160 S.E.2d 495 (1968).

§ **41-6.1. Meaning of "next of kin".**—A limitation by deed, will, or other writing, to the "next of kin" of any person shall be construed to be to those persons who would take under the law of intestate succession, unless a contrary intention appears by the instrument. (1967, c. 948.)

§ 41-10. Titles quieted.

I. GENERAL CONSIDERATION.

This section is liberally construed. York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

The distinction between a suit to remove a cloud upon title and an action to quiet title under this section is clear. In the old equity action, to remove a cloud upon title to real property, the proceeding was an equitable one and was intended to remove a particular instrument or documentary evidence of title or encumbrance against the title, which was hanging over or threatening a plaintiff's rights therein. In a suit to quiet title to real property under this section, the proceeding is designed and intended to provide a means for determining all adverse claims, equitable or otherwise. It is not limited to a particular instrument, bit of evidence, or encumbrance but is aimed at silencing all adverse claims, documentary or otherwise. Any action that could have been brought under the old equitable proceeding to remove a cloud upon title may now be brought under the provision of this section. York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

The General Assembly did not include personal property under the provisions of this section. Newman Machine Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968).

A bill to quiet title or to remove a cloud on title to personal property may be maintained in equity, in the absence of statutory authorization, where, by reason of exceptional circumstances, there is no adequate remedy at law. Newman Machine Co. v. Newman, 275 N.C. 189, 166 S.E.2d 63 (1969).

Even though there is no statute in North Carolina authorizing suits to quiet title to personalty, the Supreme Court adheres to the general rule that such suits may be maintained in equity where, due to exceptional circumstances, there is no adequate remedy at law. Newman Machine Co. v. Newman, 275 N.C. 189, 166 S.E.2d 63 (1969).

Since North Carolina has no statute regarding suits in equity to remove cloud or quiet title to personalty, the Supreme Court applies to such suits the same principles which obtained prior to enactment of this section when title to land was involved. Newman Machine Co. v. Newman, 275 N.C. 189, 166 S.E.2d 63 (1969).

For requirements in equity suits to remove cloud and quiet title to realty prior to enactment of this section, see Newman Machine Co. v. Newman, 275 N.C. 189, 166 S.E.2d 63 (1969).

A declaratory action is an appropriate remedy to perform the function of the customary action to quiet title. York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

Cited in Newbern v. Barnes, 3 N.C. App. 521, 165 S.E.2d 526 (1969).

II. NATURE AND SCOPE OF REMEDY.

A. Purpose.

In General.—

This section was designed to avoid some of the limitations imposed upon the remedies formerly embraced by a bill of peace or a bill quia timet, and to establish an easy method of quieting titles of land against adverse claims. Newman Machine Co. v. Newman, 275 N.C. 189, 166 S.E.2d 63 (1969).

III. PLEADING AND PRACTICE.

B. Pleadings.

Sufficiency of Bill, etc.—

A complaint alleging that plaintiffs are the owners of a described tract of land by record title and that the State claims an interest therein by virtue of a specified registered deed, that plaintiffs have a superior title, and that the State's claim constituted a cloud on plaintiff's title is sufficient to state a cause of action to quiet title, and such action may be maintained against the State under the provisions of § 41-10.1. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966).

A complaint meets the minimum requirements of this section where it alleges that the plaintiffs own the described land and that the defendant claims an interest therein adverse to them. York v. Newman, 2 N.C. 484, 163 S.E.2d 282 (1968).

§ 41-10.1. Trying title to land where State claims interest.

Sufficiency of Complaint.—A complaint alleging that plaintiffs are the owners of a described tract of land by record title and that the State claims an interest therein by virtue of a specified registered deed, that plaintiffs have a superior title, and that the State's claim constituted a cloud on plaintiff's title is sufficient to state a cause of action to quiet title, and such action may be maintained against the State under the provisions of this section. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966).

§ 41-11. Sale, lease or mortgage in case of remainders.—In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale, lease or mortgage of the property by a special proceeding in the superior court, which proceeding shall be conducted in the manner pointed out in this section. Said proceeding may be commenced by summons by any person having a vested interest in the land, and all persons in esse who are interested in said land shall be made parties defendant and served with summons in the way and manner now provided by law for the service of summons in other special proceedings, as provided by Rule 4 of the Rules of Civil Procedure, and service of summons upon nonresidents, or persons whose names and residences are unknown, shall be by publication as now required by law or such service in lieu of publication as now provided by law. In cases where the remainder will or may go to minors, or persons under other disabilities, or to persons not in being, or whose names and residences are not known, or who may in any contingency become interested in said land, but because of such contingency cannot be ascertained, the clerk of the superior court shall, after due inquiry of persons who are in no way interested in or connected with such proceeding, designate and appoint some discreet person as guardian ad litem, to represent such remainderman, upon whom summons shall be served as provided by law for other guardians ad litem, and it shall be the duty of such guardian ad litem to defend such actions, and when counsel is needed to represent him, to make this known to the clerk, who shall by an order give instructions as to the employment of counsel and the payment of fees.

The court shall, if the interest of all parties require or would be materially enhanced by it, order a sale of such property or any part thereof for reinvestment, either in purchasing or in improving real estate, less expense allowed by the court for the proceeding and sale, and such newly acquired or improved real estate shall be held upon the same contingencies and in like manner as was the property ordered to be sold. The court may authorize the loaning of such money subject to its approval until such time when it can be reinvested in real estate. And after the sale of such property in all proceedings hereunder, where there is a life estate, in lieu of said interest or investment of proceeds to which the life tenant would be entitled to, or to the use of, the court may in its discretion order the value of said life tenant's share during the probable life of such life tenant, to be ascertained as now provided by law, and paid out of the proceeds of such sale absolutely, and the remainder of such proceeds be reinvested as herein pro-

vided. Any person or persons owning a life estate in lands which are unproductive and from which the income is insufficient to pay the taxes on and reasonable upkeep of said lands shall be entitled to maintain an action, without the joinder of any of the remaindermen or reversioners as parties plaintiff, for the sale of said property for the purpose of obtaining funds for improving other nonproductive and unimproved real estate so as to make the same profit-bearing, all to be done under order of the court, or reinvestment of the funds under the provisions of this section, but in every such action when the rights of minors or other persons not sui juris are involved, a competent and disinterested attorney shall be appointed by the court to file answer and represent their interests. The provisions of the preceding sentence, being remedial, shall apply to cases where any title in such lands shall have been acquired before, as well as after, its passage—March 7, 1927.

The clerk of the superior court is authorized to make all orders for the sale, lease or mortgage of property under this section, and for the reinvestment or securing and handling of the proceeds of such sales, but no sale under this section shall be held or mortgage given until the same has been approved by the resident judge of the district, or the judge holding the courts of the district at the time said order of sale is made. The approval by the resident judge of the district may be made by him either in term or at chambers. All orders of approval under said statute by judges resident in the district heretofore made either in term or at chambers are hereby ratified and validated.

The court may authorize the temporary reinvestment, pending final investment in real estate, of funds derived from such sale in any direct obligation of the United States of America or any indirect obligation guaranteed both as to principal and interest or bonds of the State of North Carolina issued since the year one thousand eight hundred and seventy-two; but in the event of such reinvestment, the commissioners, trustees or other officers appointed by the court to hold such funds shall hold the bonds in their possession and shall pay to the life tenant and owner of the vested interest in the lands sold only the interest accruing on the bonds, and the principal of the bonds shall be held subject to final reinvestment and to such expense only as is provided in this section. Temporary reinvestments, as aforesaid, in any direct obligation of the United States of America or any indirect obligation guaranteed both as to principal and interest or State bonds heretofore made with the approval of the court of all or a part of the funds derived from such sales are ratified and declared valid.

The court shall, if the interest of the parties require it and would be materially enhanced by it, order such property mortgaged for such term and on such condition as to the court seems proper and to the best interest of the interested parties. The proceeds derived from the mortgage shall be used for the purpose of adding improvements to the property or to remove existing liens on the property as the court may direct, but for no other purpose. The mortgagees shall not be held responsible for determining the validity of the liens, debts and expenses where the court directs such liens, debts and expenses to be paid. In all cases of mortgages under this section the court shall authorize and direct the guardian representing the interest of minors and the guardian ad litem representing the interest of those persons unknown or not in being to join in the mortgage for the purpose of conveying the interest of such person or persons. In all cases of mortgages under this section the owner of the vested interest or his or her legal representative shall within six months from the date of the mortgage file with the court an itemized statement showing how the money derived from the said mortgage has been expended, and shall exhibit to the court receipts for said money. Said report shall be audited in the same manner as provided for the auditing of guardian's accounts. The owner of the vested interest or his or her legal representative shall collect the rents and income from the property mortgaged and apply the proceeds first to taxes and discharge of interest on the mortgage and the annual curtailment as

provided thereby, or if said person uses or occupies said premises he or she shall pay the said taxes, interest and curtailments and said party shall enter into a bond to be approved by the court for the faithful performance of the duties hereby imposed, and such person shall annually file with the court a report and receipts showing that taxes, interest and the curtailment as provided by the mortgage have been paid.

The mortgagee shall not be held responsible for the application of the funds secured or derived from the mortgage. The word "mortgage" whenever used herein shall be construed to include deeds in trust. (1903, c. 99; 1905, c. 548; Rev., s. 1590; 1907, cc. 956, 980; 1919, c. 17; C. S., s. 1744; Ex. Sess. 1921, c. 88; 1923, c. 69; 1925, c. 281; 1927, cc. 124, 186; 1933, c. 123; 1935, c. 299; 1941, c. 328; 1943, cc. 198, 729; 1947, c. 377; 1951, c. 96; 1967, c. 954, s. 3.)

I. GENERAL CONSIDERATION.

Editor's Note.—

The 1967 amendment, effective Jan. 1, 1970, substituted "Rule 4 of the Rules of Civil Procedure" for "§ 1-94" in the second sentence.

The Rules of Civil Procedure are found in § 1A-1.

Session Laws 1969, c. 803, amended Session Laws 1967, c. 954, s. 10 (originally effective July 1, 1969), so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

Cited in De Lotbiniere v. Wachovia Bank & Trust Co., 2 N.C. App. 252, 163 S.E.2d 59 (1968).

§ 41-11.1. Sale, lease or mortgage of property held by a "class," where membership may be increased by persons not in esse.

Cited in De Lotbiniere v. Wachovia Bank & Trust Co., 2 N.C. App. 252, 163 S.E.2d 59 (1968).

Chapter 42.

Landlord and Tenant.

Article 1.

General Provisions.

§ 42-1. Lessor and lessee not partners.

Editor's Note.—For case law survey as to landlord and tenant, see 44 N.C.L. Rev. 1027 (1966); 45 N.C.L. Rev. 968 (1967).

§ 42-3. Term forfeited for nonpayment of rent.

Cited in Morris v. Austraw, 269 N.C. 218, 152 S.E.2d 155 (1967).

§ 42-4. Recovery for use and occupation.

Editor's Note.—For article on remedies for trespass on land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

§ 42-9. Agreement to rebuild, how construed in case of fire.

Provisions of section are limited to destruction of house by fire. Atlantic Discount Corp. v. Mangel's of N.C., Inc., 2 N.C. App. 472, 163 S.E.2d 295 (1968).

§ 42-10. Tenant not liable for accidental damage.

Editor's Note.—For note on lessee's liability for sublessee's negligence, see 45 N.C.L. Rev. 295 (1966).

§ 42-14. Notice to quit in certain tenancies.

Effect of Holding Over.—

In the absence of a provision in the lease for an extension of the term, when a tenant under a lease for a fixed term of one year, or more, holds over after the end of the term the lessor may eject him or recognize him as a tenant. Kearney v. Hare, 265 N.C. 570, 144 S.E.2d 636 (1965).

When a tenant under a lease for a fixed term of one year, or more, holds over after the end of the term and the lessor elects to treat him as a tenant, such a tenancy may be terminated by either party at the end of any year thereof by giving notice of his intent so to terminate it thirty days before the end of such year. Kearney v. Hare, 265 N.C. 570, 144 S.E.2d 636 (1965).

If the lessor elects to treat as a tenant one holding over after the end of the term of a lease for one year or more, a new tenancy relationship is created as of the end of the former term. This is, by presumption of law, a tenancy from year to year, the terms of which are the same as those of the former lease insofar as they are applicable, in the absence of a new contract between them or of other circumstances rebutting such presumption. Such a tenancy may be terminated by either party at the end of any year thereof by giving notice of his intent so to terminate it thirty days before the end of such year. Kearney v. Hare, 265 N.C. 570, 144 S.E.2d 636 (1965).

Nothing else appearing, when a tenant for a fixed term of one year or more holds over after the expiration of such term, the lessor has an election. He may treat him as a trespasser and bring an action to evict him and to recover reasonable compensation for the use of the property, or he may recognize him as still a tenant, having the same rights and duties as under the original lease, except that the tenancy is one from year to year and is terminable by either party upon giving to the other thirty days' notice directed to the end of any year of such new tenancy. Coulter v. Capitol Fin. Co., 266 N.C. 214, 146 S.E.2d 97 (1966).

Same—Change of Notice Period by Agreement.—Where a lease for an original term of thirty-six months provided that, "should the lessee remain in possession of the leased premises beyond the expiration of the original term or any renewal or extension of this lease, which shall result in a tenancy from month to month, this lease may be terminated by either party upon the giving of thirty (30) days' written notice to the other party," the purpose of the clause was held to have been to provide that in such circumstances the tenancy would be from month to month, and so terminable by either party at the end of any month, but only upon thirty days' notice rather than upon the seven days' notice which would otherwise be sufficient to terminate a month to month tenancy under this section. Coulter v. Capitol Fin. Co., 266 N.C. 214, 146 S.E.2d 97 (1966).

ARTICLE 2.

Agricultural Tenancies.

§ 42-15. Landlord's lien on crops for rents, advances, etc.; enforcement.

I. IN GENERAL.

Editor's Note.—

For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

ARTICLE 3.

Summary Ejectment.

§ 42-26. Tenant holding over may be dispossessed in certain cases.

I. APPLICATION AND SCOPE.

Remedy Is Restricted, etc.—

In accord with original. See Morris v. Austraw, 269 N.C. 218, 152 S.E.2d 155 (1967).

Same—Entry as Vendee.—

A vendee under a contract for sale and purchase of land is not such a tenant as may be evicted by summary ejectment under this section. Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967).

III. BREACH OF PROVISION OF LEASE.

Condition Must Be in Lease.—

Except in cases where § 42-3 writes into a contract of a lease of lands, when the

lease is silent thereon, a forfeiture of the terms of the lease upon failure of the lessee to pay the rent within ten days after a demand is made by the lessor or his agent for all past due rent, with right of the lessor to enter and dispossess the lessee, a breach of the conditions of a lease between a landlord and tenant cannot be made the basis of summary ejectment unless the lease itself provides for termination of such breach or reserves the right of reentry for such breach. Morris v. Austraw, 269 N.C. 218, 152 S.E.2d 155 (1967).

Breach of a condition in a lease that lessee should not use or permit the use of any portion of the premises for any unlawful purpose or purposes, without provision in the lease automatically terminating the lease or reserving the right of reentry for breach of such condition, cannot be made the basis of summary ejectment, and provision in the lease that should the landlord bring suit because of the breach of any covenant and should prevail in such suit, the tenant should pay reasonable attorney's fees, does not constitute a provision automatically terminating the lease for breach of such condition or preserve the right of reentry. Morris v. Austraw, 269 N.C. 218, 152 S.E.2d 155 (1967).

Provisions for Termination on Receivership or Bankruptcy Are Not Void.—The provisions of a lease authorizing lessors to terminate the lease and repossess the property upon the appointment of a receiver for lessee or adjudication that it was a bankrupt are not void. They are not contrary to public policy nor prohibited by statute. To the contrary, similar provisions are frequently inserted in leases, particularly when of long duration. Carson v. Imperial '400' Nat'l, Inc., 267 N.C. 229, 147 S.E.2d 898 (1966).

§ 42-28. Summons issued by justice on verified complaint.

Applied in Morris v. Austraw, 269 N.C. 218, 152 S.E.2d 155 (1967).

Chapter 43.

Land Registration.

Article 3.

Procedure for Registration.

§ 43-9. Summons issued and served; disclaimer. — Summons shall be issued and shall be returnable as in other cases of special proceedings, except that the return shall be at least sixty days from the date of the summons. The summons shall be served at least ten days before the return thereof and the return recorded in the same manner as in other special proceedings; and all parties under disabilities shall be represented by guardian, either general or ad litem. If the persons named as interested are not residents of the State of North Carolina, and their residence is known, which must appear by affidavit, the summons must be served on such nonresidents as is now prescribed by law for service of summons on nonresidents.

Any party defendant to such proceeding may file a disclaimer of any claim or interest in the land described in the petition, which shall be deemed an admission of the allegations of the petition, and the decree shall bar such party and all persons thereafter claiming under him, and such party shall not be liable for any costs or expenses of the proceeding except such as may have been incurred by reason of his delay in pleading. (1913, c. 90, s. 6; C. S., s. 2385; 1967, c. 954, s. 3.)

Editor's Note. — The 1967 amendment, effective July 1, 1969, rewrote the first sentence.

The amendment to this section eliminated a former provision that summons should be directed to the sheriff. Compare Rule 4 of the Rules of Civil Procedure (§ 1A-1) and the amendment to the special proceedings statute, § 1-394.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

§ 43-11. Hearing and decree.

(c) Exceptions to Report.—Any of the parties to the proceeding may, within twenty days after such report is filed, file exceptions, either to the conclusions of law or fact. Whereupon the clerk shall transmit the record to the judge of the superior court for his determination thereof; such judge may on his own motion certify any issue of fact arising upon any such exceptions to the superior court of the county in which the proceeding is pending, for a trial of such issue by jury, and he shall so certify such issue of fact for trial by jury upon the demand of any party to the proceeding. If, upon consideration of such record, or the record and verdict of issues to be certified and tried by jury, the title be found in the petitioner, the judge shall enter a decree to that effect, ascertaining all limitations, liens, etc., declaring the land entitled to registration accordingly, and the same, together with the record, shall be docketed by the clerk of the court as in other cases, and a copy of the decree certified to the register of deeds of the county for registration as hereinafter provided. Any of the parties may appeal from such judgment to the appellate division, as in other special proceedings.

(1969, c. 44, s. 48.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" in the last sentence of subsection (c).

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

ARTICLE 4.

Registration and Effect.

§ 43-17.1. Issuance of certificate upon death of registered owner; petition and contents; dissolution of corporation; certificate lost or not received by grantee.—Upon the death of any person who is the registered owner of any estate or interest in land which has been brought under this chapter, a petition may be filed with the clerk of the superior court of the county in which the title to such land is registered by anyone having any estate or interest in the land, or any part thereof, the title to which has been registered under the terms of this chapter, attaching thereto the registered certificate of title issued to the deceased holder and setting forth the nature and character of the interest or estate of such petitioner in said land, the manner in which such interest or estate was acquired by the petitioner from the deceased person—whether by descent, by will, or otherwise, and setting forth the names and addresses of any and all other persons, firms or corporations which may have any interest or estate therein, or any part thereof, and the names and addresses of all persons known to have any claims or liens against the said land; and setting forth the changes which are necessary to be made in the registered certificate of title to land in order to show the true owner or owners thereof occasioned by the death of the registered owner of said certificate. Such petition shall contain all such other information as is necessary to fully inform the court as to the status of the title and the condition as to all liens and encumbrances against said land existing at the time the petition is filed, and shall contain a prayer for such relief as the petitioner may be entitled to under the provisions hereof. Such petition shall be duly verified.

Like procedure may be followed as herein set forth upon the dissolution of any corporation which is the registered owner of any estate or interest in the land which has been brought under this chapter.

In the event the registered certificate of title has been lost and after due diligence cannot be found, and this fact is made to appear by allegation in the petition, such registered certificate of title need not be attached to the petition as hereinabove required, but the legal representatives of the deceased registered owner shall be made parties to the proceeding. If such persons are unknown or, if known cannot after due diligence be found within the State, service of summons upon

them may be made by publication of the notice prescribed in § 43-17.2. In case the registered owner is a corporation which has been dissolved, service of summons upon such corporation and any others who may have or claim any interest in such land thereunder shall be made by publication of the notice containing appropriate recitals as required by § 43-17.2.

If any registered owner has by writing conveyed or attempted to convey a title to any registered land without the surrender of the certificate of title issued to him, the person claiming title to said lands under and through said registered owner by reason of his or its conveyance may file a petition with the clerk of the superior court of the county in which the land is registered and in the proceeding under which the title was registered praying for the cancellation of the original certificate and the issuance of the new certificate. Upon the filing of such petition notice shall be published as prescribed in § 43-17.2. The clerk of the superior court with whom said petition is filed shall by order determine what additional notice, if any, shall be given to registered owners. If the registered owner is a natural person, deceased, or a corporation dissolved the court may direct what additional notice, if any, shall be given. The clerk shall hear the evidence, make findings of fact, and if found as a fact that the original certificate of the registered owner has been lost and cannot be found, shall enter his order directing the register of deeds to cancel the same and to issue a new certificate to such person or persons as may be entitled thereto, subject to such claims or liens as the court may find to exist.

Any party within ten days from the rendition of such judgment or order by the clerk of superior court of the county in which said land is registered may appeal to the superior court in term time, where the cause shall be heard de novo by the judge, unless a jury trial be demanded, in which event the issues of fact shall be submitted to a jury. From any order or judgment entered by the superior court in term time an appeal may be taken to the appellate division in the manner provided by law. (1943, c. 466, s. 1; 1945, c. 44; 1969, c. 44, s. 49.)

Editor's Note.—The 1969 amendment substituted "appellate division" for "Supreme Court" in the last sentence.

Chapter 44.

Liens.

ARTICLE 1.

Mechanics', Laborers', and Materialmen's Liens.

§ **44-1**: Repealed by Session Laws 1969, c. 1112, s. 4, effective January 1, 1970.

Editor's Note. — Session Laws 1969, c. 1112, s. 4.1, provides that the act shall not apply to pending litigation.

§§ **44-2 to 44-5**: Repealed by Session Laws 1967, c. 1029, s. 2, effective at midnight June 30, 1967.

Cross Reference.—As to possessory liens on personal property, see §§ 44A-1 to 44A-6.

ARTICLE 2.

Subcontractors', etc., Liens and Rights against Owners.

§ **44-6. Lien given subcontractors, etc., on real estate.**—All subcontractors and laborers who are employed to furnish or who do furnish labor or material for the building, repairing or altering any house or other improvement on real estate, have a lien on said house and real estate for the amount of such labor done or material furnished, which lien shall be preferred to the mechanic's lien now provided by law, when notice thereof shall be given as hereinafter provided which may be enforced as other liens in this chapter and in chapter 44A, except where it is otherwise provided; but the sum total of all the liens due subcontractors and materialmen shall not exceed the amount due the original contractor at the time of notice given. (1880, c. 44, ss. 1, 3; Code, ss. 1801, 1803; Rev., s. 2019; C. S., s. 2437; 1969, c. 1112, s. 2.)

Editor's Note.—

The 1969 amendment, effective Jan. 1, 1970, inserted the reference to chapter 44A. Section 4.1 of the amendatory act provides that it shall not apply to pending litigation.

§ **44-9. Subcontractors, laborers and materialmen may notify owner of claim; effect.**—Any subcontractor, laborer, mechanic, artisan, or person furnishing materials, who claims the lien provided for in this article or in article 2 of chapter 44A for labor on, or materials furnished for, any building, vessel, railroad,

or real estate, may give notice to the owner, agent or lessee who makes the contract for the labor or materials, of the amount due by the contractor to such claimant. The notice shall be in the form of an itemized statement of the amount due, except where the contract is entire for a gross sum and cannot be itemized. Upon the delivery of the notice to the owner, agent, or lessee, the claimant is entitled to all the liens and benefits conferred by law in as full a manner as though the statement were furnished by the contractor. If the said owner, agent or lessee refuses or neglects to retain, out of the amount due the contractor under the contract, a sum not exceeding the price contracted for which will be sufficient to pay such claimant, then the claimant may proceed to enforce his lien, and after such notice is given no payment to the contractor shall be a credit on or a discharge of the lien herein provided for. (1891, c. 203; 1899, c. 335; 1903, c. 478; Rev., s. 2021; 1913, c. 150, s. 4; C. S., s. 2440; 1943, c. 543; 1969, c. 1112, s. 3.)

Editor's Note.—

The 1969 amendment, effective Jan. 1, 1970, inserted the reference to article 2 of chapter 44A near the beginning of the section. Section 4.1 of the amendatory act provides that it shall not apply to pending litigation.

Article 3.

Liens on Vessels.

§§ **44-15 to 44-27**: Repealed by Session Laws 1967, c. 1029, s. 2, effective at midnight June 30, 1967.

Cross Reference.—As to possessory liens on personal property, see §§ 44A-1 to 44A-6.

Article 4.

Warehouse Storage Liens.

§§ **44-28, 44-29**: Repealed by Session Laws 1967, c. 562, s. 6, effective at midnight June 30, 1967.

Cross Reference.—See Editor's note to § 25-1-201.

Article 5.

Liens of Hotel, Boarding and Lodging House Keeper.

§§ **44-30 to 44-32**: Repealed by Session Laws 1967, c. 1029, s. 2, effective at midnight June 30, 1967.

Cross Reference.—As to possessory liens on personal property, see §§ 44A-1 to 44A-6.

Article 6.

Liens of Livery Stable Keepers.

§§ **44-33 to 44-35**: Repealed by Session Laws 1967, c. 1029, s. 2, effective at midnight June 30, 1967.

Cross Reference.—As to possessory liens on personal property, see §§ 44A-1 to 44A-6.

ARTICLE 7.

Liens on Colts, Calves and Pigs.

§§ **44-36 to 44-37.1**: Repealed by Session Laws 1967, c. 1029, s. 2, effective at midnight June 30, 1967.

Cross Reference.—As to possessory liens on personal property, see §§ 44A-1 to 44A-6.

ARTICLE 8.

Perfecting, Recording, Enforcing and Discharging Liens.

§ 44-38. Claim of lien to be filed; place of filing.

There Is No Lien if Claim Is Defective.—The claim of lien is the foundation of the action to enforce the lien, and if such lien is defective when filed, it is no lien. Mebane Lumber Co. v. Avery & Bullock Builders, Inc., 270 N.C. 337, 154 S.E.2d 665 (1967).

Particularity Required of Claim Filed.—In accord with 4th paragraph in original. See Mebane Lumber Co. v. Avery & Bullock Builders, Inc., 270 N.C. 337, 154 S.E.2d 665 (1967).

When Itemization Not Required.—Where the contract is to complete a building for one sum, it is not required that the labor and materials furnished shall be itemized. Mebane Lumber Co. v. Avery & Bullock Builders, Inc., 270 N.C. 337, 154 S.E.2d 665 (1967).

Where the plaintiff contracted to do certain work for the defendant for "a stated amount," or to furnish materials for a "gross sum," the contract is entire, and particular itemization of the claim of lien is not required, as is required for divisible contracts for materials or labor. Mebane Lumber Co. v. Avery & Bullock Builders, Inc., 270 N.C. 337, 154 S.E.2d 665 (1967).

Instance of Insufficiency.—A claim of lien based on separate statements respectively specifying the date materials were furnished and the amount due therefor, but describing the materials only as loads delivered on the respective dates, disclosed that the materials were furnished under a severable and not an entire contract, and the materials were not itemized as required by this section for a valid lien. Mebane Lumber Co. v. Avery & Bullock Builders, Inc., 270 N.C. 337, 154 S.E.2d 665 (1967).

When Defect Not Cured, etc.—A defect in a lien cannot be cured by amendment after the filing period has expired, nor by alleging the necessary facts in the pleadings in an action to enforce the lien. Mebane Lumber Co. v. Avery & Bullock Builders, Inc., 270 N.C. 337, 154 S.E.2d 665 (1967).

Applied in Neal v. Whisnant, 266 N.C. 89, 145 S.E.2d 379 (1965).

Cited in G. L. Wilson Bldg. Co. v. Leatherwood, 268 F. Supp. 609 (W.D.N.C. 1967).

§ **44-38.1**: Repealed by Session Laws 1967, c. 562, s. 7, effective at midnight June 30, 1967.

Cross Reference.—See Editor's note to § 25-1-201.

§§ **44-39 to 44-46**: Repealed by Session Laws 1969, c. 1112, s. 4, effective January 1, 1970.

Editor's Note.—Session Laws 1969, c. 1112, s. 4.1, provides that the act shall not apply to pending litigation.

ARTICLE 9.

Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

§ **44-49. Lien created; applicable to persons non sui juris.**—From and after March 26, 1935, there is hereby created a lien upon any sums recovered as

damages for personal injury in any civil action in this State, the said lien in favor of any person, corporation, municipal corporation or county to whom the person so recovering, or the person in whose behalf the recovery has been made, may be indebted for drugs, medical supplies, ambulance services, and medical services rendered by any physician, dentist, trained nurse, or hospitalization, or hospital attention and/or services rendered in connection with the injury in compensation for which the said damages have been recovered. Where damages are recovered for and in behalf of minors or persons non compos mentis, such liens shall attach to the sum recovered as fully as if the said person were sui juris.

Notwithstanding the provisions of paragraph one of this section, no lien therein provided for shall be valid with respect to any claims whatsoever unless the person or corporation entitled to the lien therein provided for shall file a claim with the clerk of the court in which said civil action is instituted within 30 days after the institution of such action and further provided that the physician, dentist, trained nurse, hospital or such other person as has a lien hereunder shall, without charge to the attorney as a condition precedent to the creation of such lien, furnish upon request to the attorney representing the person in whose behalf the claim for personal injury is made, an itemized statement, hospital record, or medical report for the use of such attorney in the negotiation settlement or trial of the claim arising by reason of the personal injury.

No liens of the character provided for in the first paragraph of this section shall hereafter be valid with respect to money that may be recovered in any pending civil actions in this State unless claims based on such liens are filed with the clerk of the court in which the action is pending within 90 days after April 5, 1947.

No action shall lie against any clerk of court or any surety on any clerk's bond to recover any claims based upon any lien or liens created by the first paragraph of this section when recovery has heretofore been had by the person injured, and no claims against such recovery were filed with the clerk by any person or corporation, and the clerk has otherwise disbursed according to law the money recovered in such action for personal injuries. (1935, c. 121, s. 1; 1947, c. 1027; 1959, c. 800, s. 1; 1967, c. 1204, s. 1; 1969, c. 450, s. 1.)

Editor's Note.—

The 1967 amendment added at the end of the second paragraph the language beginning with the words "and further provided." Section 3 of the amendatory act provides that it shall not affect any civil action filed prior to Sept. 1, 1967.

The 1969 amendment rewrote the first sentence so as to make it applicable to municipal corporations and counties and to ambulance services and deleted "and effectively" near the end of the second sentence of the first paragraph.

For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

Minor Cannot, etc.—

In accord with 1st paragraph in original. See Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

§ 44-50. Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.—Such a lien as provided for in G.S. 44-49 shall also attach upon all funds paid to any person in compensation for or settlement of the said injuries, whether in litigation or otherwise; and it shall be the duty of any person receiving the same before disbursement thereof to retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for such drugs, medical supplies, ambulance service and medical attention and/or hospital service, after having received and accepted notice thereof: Provided, that evidence as to the amount of such charges shall be competent in the trial of any such action: Provided, further, that nothing herein contained shall be construed so as to interfere with any amount due for attorney's services: Provided, further, that the lien hereinbefore provided for shall in no case, exclusive of attorneys' fees, exceed fifty

percent of the amount of damages recovered. (1935, c. 121, s. 2; 1959, c. 800, s. 2; 1969, c. 450, s. 2.)

Editor's Note.—The 1969 amendment inserted "ambulance service" near the middle of the section.

Article 9A.

Liens for Ambulance Service.

§ 44-51.1. Lien on real property of recipient of ambulance service paid for or provided by county or municipality.—There is hereby created a general lien upon the real property of any person who has been furnished ambulance service by a county or municipal agency or at the expense of county or municipal government. The lien created by this section shall continue from the date of filing until satisfied, except that no action to enforce it may be brought more than ten years after the date on which ambulance service was furnished nor more than three years after the date of recipient's death. Failure to bring action within such times shall be a complete bar against any recovery and shall extinguish the lien. (1969, c. 684.)

§ 44-51.2. Filing within ninety days required.—No lien created by G.S. 44-51.1 shall be valid but from the time of filing in the office of the clerk of superior court a statement containing the name and address of the person against whom the lien is claimed, the name of the county or municipality claiming the lien, the amount of the unpaid charge for ambulance service, and the date and place of furnishing ambulance service for which charges are asserted and the lien claimed. No lien under this article shall be valid unless filed in accordance with this section within 90 days of the date of the furnishing the ambulance service. (1969, c. 684.)

§ 44-51.3. Discharge of lien.—Liens created by this article may be discharged as follows:

(1) By filing with the clerk of superior court a receipt or acknowledgment, signed by the county or municipal treasurer, that the lien has been paid or discharged;

(2) By depositing with the clerk of superior court money equal to the amount of the claim, which money shall be held for the benefit of the claimant; or

(3) By an entry in the lien docket that the action on the part of the lien claimant to enforce the lien has been dismissed, or a judgment has been rendered against the claimant in such action. (1969, c. 684.)

Article 9B.

Attachment or Garnishment and Lien for Ambulance Service in Certain Counties.

§ 44-51.4. Attachment or garnishment for county or city ambulance service.—Whenever ambulance services are provided by a county or by a municipally owned and operated ambulance service and a recipient of such ambulance services or one legally responsible for the support of a recipient of such services fails to pay charges fixed for such services for a period of ninety days after the rendering of such services, the county or municipality providing the ambulance services may treat the amount due for such services as if it were a tax due to the county or municipality and may proceed to collect the amount due through the use of attachment and garnishment proceedings as set out in G.S. 105-385 (d). (1969, c. 708, s. 1.)

§ **44-51.5. General lien for county or city ambulance service.**—There is hereby created a general lien upon the real property of any person who has been furnished ambulance service by a county or municipal agency or at the expense of a county or municipal government or upon the real property of one legally responsible for the support of any person who has been furnished such ambulance service. (1969, c. 708, s. 2.)

§ **44-51.6. Lien to be filed.**—No lien created by § 44-51.5 shall be valid but from the time of filing in the office of the clerk of superior court a statement containing the name and address of the person against whom the lien is claimed, the name of the county or municipality claiming the lien, the amount of the unpaid charge for ambulance service, and the date and place of furnishing the ambulance service for which charges are asserted and the lien claimed. No lien under this section shall be valid unless filed after ninety days of the date of the furnishing of ambulance service, and within one hundred eighty days of the date of the furnishing of ambulance service. (1969, c. 708, s. 3.)

§ **44-51.7. Discharging lien.**—Liens created by § 44-51.5 may be discharged as follows:

(1) By filing with the clerk of superior court a receipt of acknowledgment, signed by the county treasurer, that the lien has been paid or discharged;

(2) By depositing with the clerk of superior court money equal to the amount of the claim, which money shall be held for the benefit of the claimant; or

(3) By an entry in the lien docket that the action on the part of the lien claimant to enforce the lien has been dismissed, or a judgment has been rendered against the claimant in such action. (1969, c. 708, s. 4.)

§ **44-51.8. Counties to which article applies.**—The provisions of this article shall apply only to Anson, Bladen, Brunswick, Buncombe, Caldwell, Caswell, Catawba, Columbus, Davidson, Edgecombe, Forsyth, Franklin, Gaston, Granville, Greene, Guilford, Halifax, Hertford, Hoke, Johnston, Jones, Lee, Lenoir, Lincoln, Madison, Mitchell, Montgomery, Moore, Nash, Onslow, Pasquotank, Person, Pitt, Richmond, Robeson, Rockingham, Scotland, Vance, Warren, Watauga, Wilkes, Wilson, and Yancey counties. (1969, c. 708, s. 5; c. 1197.)

Editor's Note. — The 1969 amendment inserted Hertford in the list of counties.

Article 10.

Agricultural Liens for Advances.

§§ **44-52 to 44-64**: Repealed by Session Laws 1965, c. 700, s. 2, effective at midnight June 30, 1967.

Article 11.

Uniform Federal Tax Lien Registration Act.

§§ **44-65 to 44-68**: Repealed by Session Laws 1969, c. 216, effective October 1, 1969.

Cross reference.—See Editor's note to § 44-68.1.

Editor's Note. — Prior to its repeal by Session Laws 1969, c. 216, § 44-66 had been amended by Session Laws 1969, c. 80, s. 10.

§ **44-68.1. Federal tax lien; place of filing.**—(a) Notices of liens upon real property for taxes payable to the United States, and certificates and notices affecting the liens shall be filed in the office of the clerk of superior court of the county in which the real property subject to a federal tax lien is situated.

(b) Notices of liens upon personal property, whether tangible or intangible, for taxes payable to the United States and certificates and notices affecting the liens shall be filed as follows:

(1) If the person against whose interest the tax lien applies is a corporation or a partnership whose principal executive office is in this State, as these entities are defined in the internal revenue laws of the United States, in the office of the Secretary of State;

(2) In all other cases in the office of the clerk of superior court of the county where the taxpayer resides at the time of filing of the notice of lien. (Ex. Sess. 1924, c. 44, s. 1; 1969, c. 216.)

Editor's Note.—Session Laws 1969, c. 216, repealed former article 11, entitled "Liens for Internal Revenue," consisting of §§ 44-65 to 44-68, and enacted present article 11, effective Oct. 1, 1969, in lieu thereof.

§ **44-68.2. Execution of notices and certificates.**—Certificate by the secretary of the treasury of the United States or his delegate of notices of liens, certificates, or other notices affecting tax liens entitles them to be filed and no other attestation, certification, or acknowledgment is necessary. (1969, c. 216.)

§ **44-68.3. Duties of filing officer.**—(a) If a notice of federal tax lien, a refiling of a notice of tax lien, or a notice of revocation of any certificate described in subsection (b) is presented to the filing officer and

(1) He is the Secretary of State, he shall cause the notice to be marked, held and indexed in accordance with the provisions of § 25-9-403 (4) of the Uniform Commercial Code as if the notice were a financing statement within the meaning of that Code; or

(2) He is the clerk of superior court, he shall endorse and stamp thereon the name of the office in which it is presented and the date and time of receipt, and shall file, alphabetically index, and docket the notice so that the docket shows the name and address of the person named in the notice, the date and time of receipt, the serial number of the district director, and the total unpaid balance of the assessment appearing on the notice of lien. No administrative rules or regulations shall be made which modify or are inconsistent with the Federal Tax Lien Act and this article.

(b) If a certificate of release, nonattachment, discharge or subordination of any tax lien is presented to the Secretary of State for filing he shall

(1) Cause a certificate of release or nonattachment to be marked, held and indexed as if the certificate were a termination statement within the meaning of the Uniform Commercial Code, except that the notice of lien to which the certificate relates shall not be removed from the files, and

(2) Cause a certificate of discharge or subordination to be held, marked and indexed as if the certificate were a release of collateral within the meaning of the Uniform Commercial Code.

(c) If a refiling notice of federal tax lien referred to in subsection (a) or any of the certificates or notices referred to in subsection (b) is presented for filing with the clerk of superior court, he shall endorse or stamp thereon the name of the office in which it is presented and the date and time of receipt, permanently attach the refiled notice or certificate to the original notice of lien, alphabetically index the same and docket the notice or certificate on the same page where the original notice of lien is docketed.

(d) Upon request of any person, the filing officer shall issue his certificate showing whether there is on file, on the date and time stated therein, any notice of federal tax lien or certificate or notice affecting the lien, filed on or after October 1, 1969, naming a particular person, and if a notice or certificate is on

file, giving the date and time of receipt of each notice or certificate. Upon request the filing officer shall furnish a copy of any notice of federal tax lien or notice or certificate affecting a federal tax lien. (Ex. Sess. 1924, c. 44, ss. 2, 3; 1953, c. 1106, ss. 1, 2; 1963, c. 544; 1969, c. 216.)

§ 44-68.4. Fees.—(a) The fee for filing and indexing each notice of lien or certificate or notice affecting the tax lien in the office of the Secretary of State is:

(1) For a tax lien on tangible and intangible personal property, two dollars ($2.00);
(2) For a certificate of discharge or subordination, two dollars ($2.00);
(3) For all other notices, including a certificate of release or nonattachment, one dollar ($1.00).

(b) The fee for furnishing the certificate provided for in § 44-68.3 (d) in the office of the Secretary of State is two dollars ($2.00), and the fee for furnishing copies provided for in § 44-68.3 (d) is one dollar ($1.00) per page.

(c) The fee for filing and indexing each notice of lien or certificate or notice affecting the tax lien in the office of the clerk of superior court and the fee for furnishing the certificate or copies provided for in § 44-68.3 (d), is as provided in G.S. 7A-308.

(d) The officer shall bill the district directors of internal revenue on a monthly basis for fees for documents filed by them. (1969, c. 216.)

§ 44-68.5. Tax liens and notices filed before October 1, 1969.—Filing officers with whom notices of federal tax liens, certificates and notices affecting such liens have been filed before October 1, 1969, shall, after that date, continue to maintain a file labeled "federal tax lien notices filed prior to October 1, 1969," containing notices and certificates filed in numerical order of receipt. If a notice of lien was filed before October 1, 1969, any certificate or notice affecting the lien shall be filed in the same office. (1969, c. 216.)

§ 44-68.6. Uniformity of interpretation.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1969, c. 216.)

§ 44-68.7. Short title.—This article may be cited as the Uniform Federal Tax Lien Registration Act. (1969, c. 216.)

Article 12.

Liens on Leaf Tobacco and Peanuts.

§ 44-69. Effective period for lien on leaf tobacco sold in auction warehouse.

Editor's Note. — For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

Article 13.

Factors' Liens.

§§ 44-70 to 44-76: Repealed by Session Laws 1965, c. 700, s. 2, effective at midnight June 30, 1967.

ARTICLE 14.

Assignment of Accounts Receivable and Liens Thereon.

§§ **44-77 to 44-85**: Repealed by Session Laws 1965, c. 700, s. 2, effective at midnight June 30, 1967.

Chapter 44A.

Statutory Liens and Charges.

Article 1.

Possessory Liens on Personal Property.

Article 2.

Part 1. Statutory Liens on Real Property.

Liens of Mechanics, Laborers and Materialmen Dealing with Owner.

ARTICLE 1.

Possessory Liens on Personal Property.

§ **44A-1. Definitions.**—As used in this article

(1) "Legal possessor" means

a. Any person entrusted with possession of personal property by an owner thereof, or

b. Any person in possession of personal property and entitled thereto by operation of law.

(2) "Lienor" means any person entitled to a lien under this article.

(3) "Owner" means

a. Any person having legal title to the property, or

b. A lessee of the person having legal title, or

c. A debtor entrusted with possession of the property by a secured party, or

d. A secured party entitled to possession, or

e. Any person entrusted with possession of the property by his employer or principal who is an owner under any of the above.

(4) "Secured party" means a person holding a security interest.

(5) "Security interest" means any interest in personal property which interest is subject to the provisions of article 9 of the Uniform Commercial Code, or any other interest intended to create security in real or personal property. (1967, c. 1029, s. 1.)

Editor's Note. — Session Laws 1967, c. 1029, s. 1, which added this article, became effective at midnight June 30, 1967. For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

§ **44A-2. Persons entitled to lien on personal property.**—(a) Any person who alters, repairs, services, treats, or improves personal property in the

ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor of the personal property has a lien upon the property. The amount of the lien shall be the lesser of

(1) The reasonable charges for the services and materials; or
(2) The contract price; or
(3) One hundred dollars ($100.00) if the lienor has dealt with a legal possessor who is not an owner.

This lien shall have priority over perfected and unperfected security interests.

(b) Any person engaged in the business of operating a hotel, motel, or boardinghouse has a lien upon all baggage, vehicles and other personal property brought upon his premises by a guest or boarder who is an owner thereof to the extent of reasonable charges for the room, accommodations and other items or services furnished at the request of the guest or boarder. This lien shall not have priority over any security interest in the property which is perfected at the time the guest or boarder brings the property to said hotel, motel or boardinghouse.

(c) Any person engaged in the business of boarding animals has a lien on the animals boarded for reasonable charges for such boarding which are contracted for with an owner or legal possessor of the animal and which become due and payable within 90 days preceding the mailing of notice of sale provided for in § 44A-4. This lien shall have priority over perfected and unperfected security interests. (1967, c. 1029, s. 1.)

§ **44A-3. When lien arises and terminates.**—Liens conferred under this article arise only when the lienor acquires possession of the property and terminate and become unenforceable when the lienor voluntarily relinquishes the possession of the property upon which a lien might be claimed, or when an owner, his agent, a legal possessor or any other person having á security or other interest in the property tenders prior to sale the amount secured by the lien plus reasonable storage, boarding and other expenses incurred by the lienor. The reacquisition of possession of property voluntarily relinquished shall not reinstate the lien. (1967, c. 1029, s. 1.)

§ **44A-4. Enforcement of lien.**—(a) Enforcement by Sale.—If the charges for which the lien is claimed under this article remain unpaid or unsatisfied for 30 days following the maturity of the obligation to pay any such charges, the lienor may enforce the lien by public or private sale as provided in this section.

(b) Private Sale.—Sale by private sale may be made in any manner that is commercially reasonable. Not less than 20 days prior to the date of the proposed private sale, the lienor shall cause notice to be mailed, as provided in subsection (e) hereof, to the person having legal title to the property, or if such person cannot be reasonably ascertained, to the person with whom the lienor dealt, and to each secured party or other person claiming an interest in the property, who is actually known to the lienor, by registered or certified mail. The lienor shall not purchase, directly or indirectly, the property at private sale and such a sale to the lienor shall be voidable.

(c) Request for Public Sale.—If an owner, any secured party, or other person claiming an interest in the property notifies the lienor, prior to the date upon or after which the sale by private sale is proposed to be made, that public sale is requested, sale by private sale shall not be made. After request for public sale is received, notice of public sale must be given as if no notice of sale by private sale had been given.

(d) Public Sale.—(1) Not less than 20 days prior to sale by public sale the lienor

a. Shall cause notice to be mailed, as provided in subsection (e) hereof, to the person having legal title to the property, or if such person cannot be reasonably ascertained, the person with

whom the lienor dealt, and to each secured party or other person claiming an interest in the property, who is actually known to the lienor, by registered or certified mail; and

b. Shall advertise the sale by posting a copy of the notice of sale at the courthouse door in the county where the sale is to be held and by publishing notice of sale once per week for two consecutive weeks in a newspaper of general circulation in the same county.

(2) A public sale must be held on a day other than Sunday and between the hours of 10:00 A.M. and 4:00 P.M.:

a. In any county where any part of the contract giving rise to the lien was performed, or

b. In the county where the obligation secured by the lien was contracted for.

(3) A lienor may purchase at public sale.

(e) Notice of Sale.—(1) The notice of sale shall include:

a. The name and address of the lienor.

b. The name of the person having legal title to the property, or if such person cannot be reasonably ascertained, the name of the person with whom the lienor dealt.

c. A description of the property.

d. The amount due for which the lien is claimed.

e. The place of the sale.

f. If a private sale the date upon or after which the sale is proposed to be made, or if a public sale the date and hour when the sale is to be held.

(2) Notice of sale required to be mailed shall be mailed to the address furnished to the lienor, or if no address has been furnished, to the last known address of the person entitled to the notice. If no address is known or reasonably ascertainable, it shall not be necessary to mail the notice.

(f) Notice to Commissioner of Motor Vehicles.—If the property upon which the lien is claimed is a motor vehicle that is required to be registered, the lienor shall send a copy of the notice of sale to the Commissioner of Motor Vehicles as required by G.S. 20-114 (c).

(g) Damages for Noncompliance.—If the lienor fails to comply substantially with any of the provisions of this section, the lienor shall be liable to the person having legal title to the property in the sum of one hundred dollars ($100.00), together with a reasonable attorney's fees [fee] as awarded by the court. Damages provided by this section shall be in addition to actual damages to which any party is otherwise entitled. (1967, c. 1029, s. 1.)

Editor's Note. — The word "fee" in brackets in subsection (g) is suggested as a correction of "fees," which appears in the 1967 Session Laws.

§ 44A-5. Proceeds of sale.—The proceeds of the sale shall be applied as follows:

(1) Payment of reasonable expenses incurred in connection with the sale. Expenses of sale include but are not limited to reasonable storage and boarding expenses after giving notice of sale.

(2) Payment of the obligation secured by the lien.

(3) Any surplus shall be paid to the person entitled thereto. (1967, c. 1029, s. 1.)

§ 44A-6. Title of purchaser.—A purchaser for value at a properly conducted sale, and a purchaser for value without constructive notice of a defect in the sale who is not the lienor or an agent of the lienor, acquires title to the

property free of any interests over which the lienor was entitled to priority. (1967, c. 1029, s. 1.)

Article 2.

Part 1. Statutory Liens on Real Property.

Liens of Mechanics, Laborers and Materialmen Dealing with Owner.

§ **44A-7. Definitions.**—Unless the context otherwise requires in this article:

(1) "Improve" means to build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property, or to construct driveways and private roadways, or to furnish materials, including trees and shrubbery, for any of such purposes, or to perform any labor upon such improvements.

(2) "Improvement" means all or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, or landscaping, including trees and shrubbery, driveways, and private roadways, on real property.

(3) An "owner" is a person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made. "Owner" includes successors in interest of the owner and agents of the owner acting within their authority.

(4) "Real property" means the real estate that is improved, including lands, leaseholds, tenements and hereditaments, and improvements placed thereon. (1969, c. 1112, s. 1.)

Editor's Note. — Session Laws 1969, c. 1112, s. 5.1, makes the act effective Jan. 1, 1970, and s. 4.1 provides that the act shall not apply to pending litigation.

§ **44A-8. Mechanics', laborers' and materialmen's lien; persons entitled to lien.**—Any person who performs or furnishes labor or furnishes materials pursuant to a contract, either express or implied, with the owner of real property, for the making of an improvement thereon shall, upon complying with the provisions of this article, have a lien on such real property to secure payment of all debts owing for labor done or material furnished pursuant to such contract. (1969, c. 1112, s. 1.)

§ **44A-9. Extent of lien.**—Liens authorized under the provisions of this article shall extend to the improvement and to the lot or tract on which the improvement is situated, to the extent of the interest of the owner. When the lot or tract on which a building is erected is not surrounded at the time of making the contract with the owner by an enclosure separating it from adjoining land of the same owner, the lot or tract to which any lien extends shall be such area as is reasonably necessary for the convenient use and occupation of such building, but in no case shall the area include a building, structure, or improvement not normally used or occupied or intended to be used or occupied with the building with respect to which the lien is claimed. (1969, c. 1112, s. 1.)

§ **44A-10. Effective date of liens.**—Liens granted by this article shall relate to and take effect from the time of the first furnishing of labor or materials at the site of the improvement by the person claiming the lien. (1969, c. 1112, s. 1.)

§ **44A-11. Perfecting liens.**—Liens granted by this article shall be perfected as of the time set forth in G.S. 44A-10 upon filing of claim of lien pursuant to G.S. 44A-12 and may be enforced pursuant to G.S. 44A-13. (1969, c. 1112, s. 1.)

§ **44A-12. Filing claim of lien.**—(a) Place of Filing.—All claims of lien against any real property must be filed in the office of the clerk of superior court in

each county wherein the real property subject to the claim of lien is located. The clerk of superior court shall note the claim of lien on the judgment docket and index the same under the name of the record owner of the real property at the time the claim of lien is filed. An additional copy of the claim of lien may also be filed with any receiver, referee in bankruptcy or assignee for benefit of creditors who obtains legal authority over the real property.

(b) Time of Filing.—Claims of lien may be filed at any time after the maturity of the obligation secured thereby but not later than 120 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien.

(c) Contents of Claim of Lien to Be Filed.—All claims of lien must be filed using a form substantially as follows:

CLAIM OF LIEN

(1) Names and address of the person claiming the lien:

(2) Name and address of the record owner of the real property claimed to be subject to the lien at the time the claim of lien is filed:

(3) Description of the real property upon which the lien is claimed: (Street address, tax lot and block number, reference to recorded instrument, or any other description of real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.)

(4) Name and address of the person with whom the claimant contracted for the furnishing of labor or materials:

(5) Date upon which labor or materials were first furnished upon said property by the claimant:

(6) General description of the labor performed or materials furnished and the amount claimed therefor:

.....

Lien Claimant

Filed this ..... day of ....., 19....

.....

Clerk of Superior Court

A general description of the labor performed or materials furnished is sufficient. It is not necessary for lien claimant to file an itemized list of materials or a detailed statement of labor performed.

(d) No Amendment of Claim of Lien.—A claim of lien may not be amended. A claim of lien may be cancelled by a claimant or his authorized agent or attorney and a new claim of lien substituted therefor within the time herein provided for original filing.

(e) Notice of Assignment of Claim of Lien.—When a claim of lien has been filed, it may be assigned of record by the lien claimant in a writing filed with the clerk of superior court who shall note said assignment in the margin of the judgment docket containing the claim of lien. Thereafter the assignee becomes the lien claimant of record. (1969, c. 1112, s. 1.)

§ 44A-13. Action to enforce lien.—(a) Where and When Action Instituted.—An action to enforce the lien created by this article may be instituted in any county in which the lien is filed. No such action may be commenced later than 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien. If the title to the real property against which the lien is asserted is by law vested in a receiver or trustee in bankruptcy, the lien shall be enforced in accordance with the orders of the court having jurisdiction over said real property.

(b) Judgment.—Judgment enforcing a lien under this article may be entered for the principal amount shown to be due, not exceeding the principal amount

stated in the claim of lien enforced thereby. The judgment shall direct a sale of the real property subject to the lien thereby enforced. (1969, c. 1112, s. 1.)

§ 44A-14. Sale of property in satisfaction of judgment enforcing lien or upon order prior to judgment; distribution of proceeds.—(a) Execution Sale; Effect of Sale.—Except as provided in subsection (b) of this section, sales under this article and distribution of proceeds thereof shall be made in accordance with the execution sale provisions set out in G.S. 1-339.41 through G.S. 1-339.76. The sale of real property to satisfy a lien granted by this article shall pass all title and interest of the owner to the purchaser, good against all claims or interests recorded, filed or arising after the first furnishing of labor or materials at the site of the improvement by the person claiming a lien.

(b) Sale of Property upon Order Prior to Judgment.—A resident judge of superior court in the district in which the action to enforce the lien is pending, a judge regularly holding the superior courts of the said district, any judge holding a session of superior court, either civil or criminal, in the said district, a special judge of superior court residing in the said district, or the Chief Judge of the District Court in which the action to enforce the lien is pending, may, upon notice to all interested parties and after a hearing thereupon and upon a finding that a sale prior to judgment is necessary to prevent substantial waste, destruction, depreciation or other damage to said real property prior to the final determination of said action, order any real property against which a lien under this article is asserted, sold in any manner determined by said judge to be commercially reasonable. The rights of all parties shall be transferred to the proceeds of the sale. Application for such order and further proceedings thereon may be heard in or out of session. (1969, c. 1112, s. 1.)

§ 44A-15. Attachment available to lien claimant.—In addition to other grounds for attachment, in all cases where the owner removes or attempts or threatens to remove an improvement from real property subject to a lien under this article, without the written permission of the lien claimant or with the intent to deprive the lien claimant of his lien, the remedy of attachment of the property subject to the lien shall be available to the lien claimant or any other person. (1969, c. 1112, s. 1.)

§ 44A-16. Discharge of record lien.—Any lien filed under this article may be discharged by any of the following methods:

(1) The lien claimant of record, his agent or attorney, in the presence of the clerk of superior court may acknowledge the satisfaction of the lien indebtedness, whereupon the clerk of superior court shall forthwith make upon the record of such lien an entry of such acknowledgment of satisfaction, which shall be signed by the lien claimant of record, his agent or attorney, and witnessed by the clerk of superior court.

(2) The owner may exhibit an instrument of satisfaction signed and acknowledged by the lien claimant of record which instrument states that the lien indebtedness has been paid or satisfied, whereupon the clerk of superior court shall cancel the lien by entry of satisfaction on the record of such lien.

(3) By failure to enforce the lien within the time prescribed in this article.

(4) By filing in the office of the clerk of superior court the original or certified copy of a judgment or decree of a court of competent jurisdiction showing that the action by the claimant to enforce the lien has been dismissed or finally determined adversely to the claimant.

(5) Whenever a sum equal to the amount of the lien or liens claimed is deposited with the clerk of court, to be applied to the payment finally determined to be due, whereupon the clerk of superior court shall cancel the lien or liens of record. (1969, c. 1112, s. 1.)

Chapter 45.

Mortgages and Deeds of Trust.

ARTICLE 1.

Chattel Securities.

§§ 45-1 to 45-3.1: Repealed by Session Laws 1967, c. 562, s. 2, effective at midnight June 30, 1967.

Cross Reference.—See Editor's note to § 25-1-201.

ARTICLE 2.

Right to Foreclose or Sell under Power.

§ 45-7. Agent to sell under power may be appointed by parol.—All sales of real property, under a power of sale contained in any mortgage or deed of trust to secure the payment of money, by any mortgagee or trustee, through an agent or attorney for that purpose, appointed orally or in writing by such mortgagee or trustee, whether such writing has been or shall be registered or not, shall be valid, whether or not such mortgagee or trustee was or shall be present at such sale. (1895, c. 117; Rev., s. 1035; C. S., s. 2581; 1967, c. 562, s. 2.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, substituted "real property" for "property, real or personal" near the beginning of the section. See Editor's note to § 25-1-201.

§ 45-8. Survivorship among donees of power of sale.—In all mortgages and deeds of trust of real property wherein two or more persons, as trustees or otherwise, are given power to sell the property therein conveyed or embraced, and one or more of such persons dies, any one of the persons surviving having

such power may make sale of such property in the manner directed in such deed, and execute such assurances of title as are proper and lawful under the power so given; and the act of such person, in pursuance of said power, shall be as valid and binding as if the same had been done by all the persons on whom the power was conferred. (1885, c. 327, s. 2; Rev., s. 1033; C. S., s. 2582; 1967, c. 562, s. 2.)

Editor's Note.—

The 1967 amendment, effective at midnight June 30, 1967, inserted "of real property" near the beginning of the section. See Editor's note to § 25-1-201.

§ 45-10. Substitution of trustees in mortgages and deeds of trust.—In addition to the rights and remedies now provided by law, the holders or owners of a majority in amount of the indebtedness, notes, bonds, or other instruments evidencing a promise or promises to pay money and secured by mortgages, deeds of trust, or other instruments conveying real property, or creating a lien thereon, may substitute a trustee whether the trustee then named in the instrument is the original or a substituted trustee, by the execution of a paper-writing whenever it appears:

(1) In the case of individual trustees: That the trustee then named in such mortgage, deed of trust, or other instrument securing the payment of money, has died, or has removed from the State, or is not a resident of this State or cannot be found in this State, or has disappeared from the community of his residence so that his whereabouts remains unknown in such community for a period of three months or more; or that he has become incompetent to act mentally or physically, or has been committed to any institution, private or public, on account of inebriacy or conviction of a criminal offense; or that he has refused to accept such appointment as trustee, or refuses to act or has been declared a bankrupt; or that a petition in involuntary bankruptcy has been filed against him, or that a suit has been instituted in any court of this State asking relief against him on account of insolvency; or that a cause of action has been asserted against him on account of fraud against his creditors.

(2) In the case of corporate trustees: That the trustee is a foreign corporation or has ceased to do business, or has ceased to exercise trust powers, or has excluded from its regular business the performance of such trusts; or that the corporation has been declared bankrupt, or has been placed in the hands of a receiver; or that insolvency proceedings have been instituted in any court of this State or in any court of the United States against it, or that any action has been instituted in either of said courts against it in which relief is asked on the ground of insolvency or fraud against its creditors; or that any officer or commission of this State, or any employee of such commission or officer, has taken charge of its affairs for the purpose of liquidation pursuant to any statute.

The powers recited in this section shall be cumulative and optional. (1931, c. 78, ss. 1, 2; 1935, c. 227; 1943, c. 543; 1967, c. 562, s. 2.)

Editor's Note.—

The 1967 amendment, effective at midnight June 30, 1967, deleted "or personal" between "real" and "property" near the middle of the opening paragraph. See Editor's note to § 25-1-201.

Cited in In re Sale of Land of Warrick, 1 N.C. App. 387, 161 S.E.2d 630 (1968).

§ 45-11. Appointment of substitute trustee upon application of subsequent or prior lienholders; effect of substitution.—When any person, firm, corporation, county, city or town holding a lien on real property upon which there is a subsequent or prior lien created by a mortgage, deed of trust or other instrument, the mortgagee or trustee therein named being dead or having otherwise become incompetent to act, files a written application with the clerk of the

superior court of the county in which said property is located, setting forth the facts showing that said mortgagee or trustee is then dead or has become incompetent to act, the said clerk of the superior court, upon a proper finding of fact that said mortgagee or trustee is dead or has become incompetent to act, shall enter an order appointing some suitable and competent person, firm or corporation as substitute trustee upon whom service of process may be made, and said substitute trustee shall thereupon be vested with full power and authority to defend any action instituted to foreclose said property as fully as if he had been the original mortgagee or trustee named; but the substitute trustee shall have no power to cancel said mortgage or deed of trust without the joinder of the holder of the notes secured thereby. Said application shall not be made prior to the expiration of thirty days from the date the original mortgagee or trustee becomes incompetent to act. (1941, c. 115, s. 1; 1967, c. 562, s. 2.)

Editor's Note.—

The 1967 amendment, effective at midnight June 30, 1967, deleted "or personal" between "real" and "property" near the beginning of the section. See Editor's note to § 25-1-201.

§ **45-18. Validation of certain acts of substituted trustees.**—Whenever before April 1, 1969, a trustee has been substituted in a deed of trust in the manner provided by §§ 45-10 to 45-17, but the instrument executed by the holder and/or owners of all or a majority in amount of the indebtedness, notes, bonds, or other instruments secured by said deed of trust, and the certificate of the clerk of the superior court executed in connection therewith under the provisions of § 45-12, have not been registered as provided by said sections until after the substitute trustee has exercised some or all of the powers conferred by said deed of trust upon the trustee therein, including the advertising of the property conveyed by said deed of trust for sale, the sale thereof, and the execution of a deed by such substituted trustee to the purchaser at such sale, all such acts of said substituted trustee shall be deemed valid and effective in the same manner and to the same extent as if said instrument substituting said trustee, and the clerk's certificate thereon has been registered prior to the performance by said substituted trustee of any one or more of said acts, or other acts authorized by such deed of trust. (1939, c. 13; 1963, c. 241; 1967, c. 945; 1969, c. 477.)

Editor's Note.—

The 1967 amendment substituted "April 1, 1967" for "February 1, 1963" near the beginning of the section. The amendatory act is effective June 27, 1967, but provides that it shall not affect pending litigation.

The 1969 amendment substituted "1969" for "1967" near the beginning of the section. The amendatory act is effective May 12, 1969, but provides that it shall not affect pending litigation.

Article 2A.

Sales under Power of Sale.

Part 1. General Provisions.

§ **45-21.1. Definition.**—As used in this article, "sale" means only a sale of real property pursuant to an express power of sale contained in a mortgage or deed of trust. (1949, c. 720, s. 1; 1967, c. 562, s. 2.)

Cross References.—As to judicial sales, see §§ 1-339.1 to 1-339.40. As to execution sales, see §§ 1-339.41 to 1-339.71.

Editor's Note.—

The 1967 amendment, effective at midnight June 30, 1967, rewrote this section, eliminating all references to sales of personal property. See Editor's note to § 25-1-201.

§§ **45-21.5, 45-21.6:** Repealed by Session Laws 1967, c. 562, s. 2, effective at midnight June 30, 1967.

Cross Reference.—See Editor's note to § 25-1-201.

§ 45-21.11. Application of statute of limitations to serial notes.— When a series of notes maturing at different times is secured by a mortgage or deed of trust and the exercise of the power of sale for the satisfaction of one or more of the notes is barred by the statute of limitations, that fact does not bar the exercise of the power of sale for the satisfaction of indebtedness represented by other notes of the series not so barred. (1949, c. 720, s. 1; 1967, c. 562, s. 2.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, substituted "mortgage or deed of trust" for "mortgage, deed of trust or conditional sale contract" near the beginning of the section. See Editor's note to § 25-1-201.

§ 45-21.12. Power of sale barred when foreclosure barred.—(a) Except as provided in subsection (b), no person shall exercise any power of sale contained in any mortgage or deed of trust, or provided by statute, when an action to foreclose the mortgage or deed of trust, is barred by the statute of limitations.

(b) If a sale pursuant to a power of sale contained in a mortgage or deed of trust, or provided by statute, is commenced within the time allowed by the statute of limitations to foreclose such mortgage or deed of trust, the sale may be completed although such completion is effected after the time when commencement of an action to foreclose would be barred by the statute. For the purpose of this section, a sale is commenced when the notice of the sale is first posted or published as provided by this article or by the terms of the instrument pursuant to which the power of sale is being exercised. (1949, c. 720, s. 1; 1967, c. 562, s. 2; 1969, c. 984, s. 1.)

Editor's Note.—

The 1967 amendment, effective at midnight June 30, 1967, deleted references to conditional sales contract in subsection (a) and near the beginning of subsection (b). See Editor's note to § 25-1-201.

The 1969 amendment, effective Oct. 1, 1969, deleted references to conditional sales contracts in subsection (a) and the first sentence of subsection (b).

For comment on application of statute of limitations to promise of grantee assuming mortgage or deed of trust, see 43 N.C.L. Rev. 966 (1965).

§ 45-21.13: Repealed by Session Laws 1967, c. 562, s. 2, effective at midnight June 30, 1967.

Cross Reference.—

See Editor's note to § 25-1-201.

Part 2. Procedure for Sale.

§ 45-21.16. Contents of notice of sale.

(4) Repealed by Session Laws 1967, c. 562, s. 2, effective at midnight June 30, 1967.

(1967, c. 562, s. 2.)

Editor's Note.—

The 1967 amendment, effective at midnight June 30, 1967, repealed subdivision (4). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, it is not set out.

Applied in Financial Servs. Corp. v. Welborn, 269 N.C. 563, 153 S.E.2d 7 (1967).

§ 45-21.17. Posting and publishing notice of sale of real property.

(c) When the notice of sale is published in a newspaper,

(1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than twenty-two days, including Sundays, and

(2) The date of the last publication shall be not more than 10 days preceding the date of the sale.

(1967, c. 979, s. 3.)

Editor's Note.—

The 1967 amendment, effective Oct. 1, 1967, substituted "be not more than 10" for "not be more than seven" in subdivision (2) of subsection (c).

As only subsection (c) was affected by

the amendment, the rest of the section is not set out.

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

§§ **45-21.18, 45-21.19:** Repealed by Session Laws 1967, c. 562, s. 2, effective at midnight June 30, 1967.

Cross Reference.—See Editor's note to § 25-1-201.

§ **45-21.20. Satisfaction of debt after publishing or posting notice, but before completion of sale.**—A power of sale is terminated if, prior to the time fixed for a sale, or prior to the expiration of the time for submitting any upset bid after a sale or resale has been held, payment is made or tendered of—

(1) The obligation secured by the mortgage or deed of trust, and

(2) The expenses incurred with respect to the sale or proposed sale, which in the case of a deed of trust also include compensation for the trustee's services under the conditions set forth in G.S. 45-21.15. (1949, c. 720, s. 1; 1967, c. 562, s. 2.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, eliminated a reference to conditional sale contract in subdivision (1). See Editor's note to § 25-1-201.

§ **45-21.21. Postponement of sale.**

(b) Upon postponement of a sale, the person exercising the power of sale shall personally, or through his agent or attorney—

(1) At the time and place advertised for the sale, publicly announce the postponement thereof, and

(2) On the same day, attach to or enter on the original notice of sale or a copy thereof, posted at the courthouse door, as provided by G.S. 45-21.17, a notice of the postponement.

(1967, c. 562, s. 2.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, rewrote subdivision (2) of subsection (b) so as to make it inapplicable to notice of postponement of sale of personal property. See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (b) is set out.

§ **45-21.25:** Repealed by Session Laws 1967, c. 562, s. 2, effective at midnight June 30, 1967.

Cross Reference.—See Editor's note to § 25-1-201.

§ **45-21.27. Upset bid on real property; compliance bonds.**—(a) An upset bid is an advanced, increased, or raised bid whereby any person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten percent (10%) of the first $1000 thereof plus five percent (5%) of any excess above $1000, but in any event with a minimum increase of $25, such increase being deposited in cash, or by certified check or cashier's check satisfactory to the said clerk, with the clerk of the superior court, with whom the report of the sale was filed, within ten days after the filing of such report; such deposit to be made with the clerk of superior court before the expiration of the tenth day, and if the tenth day shall fall upon a Sunday or holiday, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made on the day following when said office is open

for the regular dispatch of its business. An upset bid need not be in writing, and the timely deposit with the clerk of the required amount, together with an indication to the clerk as to the sale to which it is applicable, is sufficient to constitute the upset bid, subject to the provisions of subsection (b).

(b) The clerk of the superior court may require the person submitting an upset bid also to deposit a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk. The amount of such bond shall not exceed the amount of the upset bid less the amount of the required deposit.

(c) The clerk of the superior court may in the order of resale require the highest bidder at a resale had pursuant to an upset bid to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk. The bond shall be in such amount as the clerk deems adequate, but in no case greater than the amount of the bid of the person being required to furnish the bond.

(d) A compliance bond, such as is provided for by subsections (b) and (c), shall be payable to the State of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with his bid. (1949, c. 720, s. 1; 1963, c. 377; 1967, c. 979, s. 3.)

Editor's Note.—

The 1967 amendment, effective Oct. 1, 1967, added at the end of the first sentence of subsection (a) the language which follows the semicolon and substituted "resale" for "sale" near the beginning of subsection (c).

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

Cited in Allied Mtge. & Dev. Co. v. Pitts, 272 N.C. 196, 158 S.E.2d 53 (1967).

§ 45-21.29. Resale of real property; jurisdiction; procedure; orders for possession.

(k) Orders for possession of real property sold pursuant to this article, in favor of the purchaser and against any party or parties in possession at the time of the sale who remain in possession at the time of application therefor, may be issued by the clerk of the superior court of the county in which such property is sold, when:

(1) Such property has been sold in the exercise of the power of sale contained in any mortgage or deed of trust or granted by this article, and
(2) The purchaser is entitled to possession, and
(3) The purchase price has been paid, and
(4) The sale has been consummated, or if a resale is held, such resale has been confirmed, and
(5) Ten days' notice has been given to the party or parties in possession at the time of the sale or resale who remain in possession at the time application is made, and
(6) Application is made to such clerk by the mortgagee, the trustee named in such deed of trust, any substitute trustee, or the purchaser of the property. (1949, c. 720, s. 1; 1951, c. 252, s. 3; 1965, c. 299; 1967, c. 979, s. 3.)

Editor's Note.—

The 1967 amendment, effective Oct. 1, 1967, rewrote subsection (k).

As only subsection (k) was affected by the amendment, the rest of the section is not set out.

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

The jurisdiction of the clerk vests at the moment an upset bid is filed with him. In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969).

Statutory Provisions Incorporated. — Statutory provisions are, by operation of law, incorporated in all mortgages and deeds of trusts and control any sale under such instruments. In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969).

Clerk May Not, etc.—

The provision of this section that on the resale of real property the clerk shall make all such orders as may be just and necessary to safeguard the interests of all parties extends to orders securing the rights of the parties as defined by statute, but not to orders abrogating or abridging such such rights. In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969).

Inadequacy of Purchase Price.—Mere inadequacy of the purchase price realized at a foreclosure sale, standing alone, is not sufficient to upset a sale duly and regularly made in strict conformity with the power of sale. In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969).

Where there is an irregularity in the sale, gross inadequacy of purchase price may be considered on the question of the materiality of the irregularity. In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969).

Gross inadequacy of consideration, when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties. In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969).

Applied in In re Sale of Land of Warrick, 1 N.C. App. 387, 161 S.E.2d 630 (1968).

§ 45-21.29a. Necessity for confirmation of sale.—No confirmation of sales of real property made pursuant to this article shall be required except as provided in G.S. 45-21.29 (h) for resales. If in case of an original sale under this article no upset bid has been filed at the expiration of the ten-day period, as provided in G.S. 45-21.27, the rights of the parties to the sale become fixed. (1967, c. 979, s. 3.)

Editor's Note. — Session Laws 1967, c. 979, s. 3, adding this section, is effective Oct. 1, 1967.

Section 4 of c. 979, Session Laws 1967, provides: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with article 10 of chapter 25, of the General Statutes."

§ 45-21.30. Failure of bidder to make cash deposit or to comply with bid; resale.

(b) Repealed by Session Laws 1967, c. 562, s. 2, effective at midnight June 30, 1967.

(1967, c. 562, s. 2.)

Editor's Note.—

The 1967 amendment, effective at midnight June 30, 1967, repealed subsection (b). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, it is not set out.

§ 45-21.31. Disposition of proceeds of sale; payment of surplus to clerk.—(a) The proceeds of any sale shall be applied by the person making the sale, in the following order, to the payment of—

(1) Costs and expenses of the sale, including the trustee's commission, if any, and a reasonable auctioneer's fee if such expense has been incurred;

(2) Taxes due and unpaid on the property sold, as provided by G.S. 105-408, unless the notice of sale provided that the property be sold subject to taxes thereon and the property was so sold;

(3) Special assessments, or any installments thereof, against the property sold, which are due and unpaid, as provided by G.S. 105-408, unless the notice of sale provided that the property be sold subject to special assessments thereon and the property was so sold;

(4) The obligation secured by the mortgage, deed of trust or conditional sale contract.

(1967, c. 562, s. 2.)

Editor's Note. — The 1967 amendment, effective at midnight June 30, 1967, deleted "if the property sold is real property" following the references to § 105-408 in subdivisions (2) and (3) of subsection (a). See Editor's note to § 25-1-201.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

Applied in Dixieland Realty Co. v. Wysor, 272 N.C. 172, 158 S.E.2d 7 (1967); Ridley v. Jim Walter Corp., 272 N.C. 673, 158 S.E.2d 869 (1968).

Cited in Sullivan v. Johnson, 268 N.C. 443, 150 S.E.2d 777 (1966).

§ 45-21.32. Special proceeding to determine ownership of surplus.

Applied in Dixieland Realty Co. v. Wysor, 272 N.C. 172, 158 S.E.2d 7 (1967).

Cited in Smith v. Clerk of Superior Court, 5 N.C. App. 67, 168 S.E.2d 1 (1969).

Article 2B.

Injunctions; Deficiency Judgments.

§ 45-21.34. Enjoining mortgage sales or confirmations thereof on equitable grounds.—Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the confirmation of any sale of such real estate by a mortgagee, trustee, commissioner or other person authorized to sell the same, to enjoin such sale or the confirmation thereof, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient: Provided, that the court or judge enjoining such sale or the confirmation thereof, whether by a temporary restraining order or injunction to the hearing, shall, as a condition precedent, require of the plaintiff or applicant such bond or deposit as may be necessary to indemnify and save harmless the mortgagee, trustee, cestui que trust, or other person enjoined and affected thereby against costs, depreciation, interest and other damages, if any, which may result from the granting of such order or injunction: Provided further, that in other respects the procedure shall be as is now prescribed by law in cases of injunction and receivership, with the right of appeal to the appellate division from any such order or injunction. (1933, c. 275, s. 1; 1949, c. 720, s. 3; 1969, c. 44, s. 50.)

Editor's Note.—

The 1969 amendment substituted "appellate division" for "Supreme Court" in the last proviso.

The trustor in a deed of trust is entitled to restrain foreclosure if the note secured by the instrument is not in default. Princeton Realty Corp. v. Kalman, 272 N.C. 201, 159 S.E.2d 193 (1967).

When Restraining Order Should Be Continued to Final Hearing.—See Princeton Realty Corp. v. Kalman, 272 N.C. 201, 159 S.E.2d 193 (1967).

Cited in In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969).

§ 45-21.35. Ordering resales before confirmation; receivers for property; tax payments.—The court or judge granting such order or injunction, or before whom the same is returnable, shall have the right before, but not after, any sale is confirmed to order a resale by the mortgagee, trustee, commissioner, or other person authorized to make the same in such manner and upon such terms as may be just and equitable: Provided, the rights of all parties in interest, or who may be affected thereby, shall be preserved and protected by bond or indemnity in such form and amount as the court may require, and the court or judge may also appoint a receiver of the property or the rents and pro-

ceeds thereof, pending any sale or resale, and may make such order for the payment of taxes or other prior lien as may be necessary, subject to the right of appeal to the appellate division in all cases. (1933, c. 275, s. 2; 1949, c. 720, s. 3; 1969, c. 44, s. 51.)

Editor's Note.—
The 1969 amendment substituted "appellate division" for "Supreme Court" near the end of the section.

§ 45-21.36. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense. — When any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part: Provided, this section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust or other instrument: Provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale made and confirmed prior to April 18, 1933. (1933, c. 275, s. 3; 1949, c. 720, s. 3; 1967, c. 562, s. 2.)

Editor's Note.—
The 1967 amendment, effective at midnight June 30, 1967, deleted "or personal property" following "real estate" near the beginning of the section. See Editor's note to § 25-1-201.

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price.—In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out. (1933, c. 36; 1949, c. 720, s. 3; c. 856; 1961, c. 604; 1967, c. 562, s. 2.)

Editor's Note.—
The 1967 amendment, effective at midnight June 30, 1967, deleted the former second paragraph, which related to sales under conditional sales contracts. See Editor's note to § 25-1-201.

Legislative Intent.—The unique features of this section manifest the legislative intent that the statute as originally enacted should apply only to purchase-money mortgages and deeds of trust given by the vendee to the vendor, and that its application to third parties be limited to assignees of the seller. Childers v. Parker's, Inc., 274 N.C. 256, 162 S.E.2d 481 (1968).

Effect of 1961 amendment.—The 1961 amendment did not change the original meaning of this section; it merely made

specific that which had theretofore been implicit. Childers v. Parker's, Inc., 274 N.C. 256, 162 S.E.2d 481 (1968).

This section was obviously designed to protect a vendor's assignee, who would not know the nature of the transaction. Childers v. Parker's, Inc., 274 N.C. 256, 162 S.E.2d 481 (1968).

Section Held Inapplicable.—

A deed of trust given by a vendee to his vendor to secure the purchase price of lands other than those described in the security instrument, cannot qualify as a purchase-money deed of trust under this section. This is true because a deed of trust is a purchase-money deed of trust only if it is made as a part of the same transaction in which the debtor purchases the land, embraces the land so purchased, and secures all or part of its purchase price. Childers v. Parker's, Inc., 274 N.C. 256, 162 S.E.2d 481 (1968).

Article 4.

Discharge and Release.

§ 45-37. Discharge of record of mortgages, deeds of trust and other instruments.—(a) Subject to the provisions of G.S. 45-73 relating to secured instruments which secure future advances, any deed of trust or mortgage or other instrument intended to secure the payment of money or the performance of any other obligation registered as required by law may be discharged and released of record in the following manner:

(1) By acknowledgment of the satisfaction of the provisions of such deed of trust, mortgage or other instrument in the presence of the register of deeds by

a. The trustee,
b. The mortgagee,
c. The legal representative of a trustee or mortgagee, or
d. A duly authorized agent or attorney of any of the above.

Upon acknowledgment of satisfaction, the register of deeds shall forthwith make upon the margin of the record of such deed of trust, mortgage or other instrument an entry of such acknowledgment of satisfaction which shall be signed by the trustee, mortgagee, legal representative, agent or attorney and witnessed by the register of deeds who shall also affix his name thereto.

(2) By exhibition of any deed of trust, mortgage or other instrument accompanied with the bond, note, or other instrument thereby secured to the register of deeds, with the endorsement of payment and satisfaction appearing thereon by

a. The obligee,
b. The mortgagee,
c. The trustee,
d. An assignee of the obligee, mortgagee, or trustee; or
e. Any chartered banking institution, national or state, qualified to do business in and having an office in the State of North Carolina, when so endorsed in the name of the institution by an officer thereof.

Upon exhibition of the instruments, the register of deeds shall cancel the mortgage, deed of trust or other instrument by entry of satisfaction on the margin of the record. The person so claiming satisfaction, performance or discharge of the debt or other obligation may retain possession of all of the instruments exhibited. The exhibition of the mortgage, deed of trust or other instrument alone to the register of deeds, with endorsement of payment, satisfaction, performance or discharge shall be sufficient if the mortgage, deed of trust or other instrument itself sets forth the obligation secured or the performance of any other obligation and does not call for or recite any note, bond or other instrument secured by it. The register of deeds may require

the person exhibiting the instruments for cancellation to furnish him an acknowledgment of cancellation of the mortgage, deed of trust or other instrument for the purpose of showing upon whose request and exhibition the mortgage, deed of trust or other instrument was cancelled.

(3) By exhibiting to the register of deeds by:

a. The grantor,

b. The mortgagor, or

c. An agent, attorney or successor in title of the grantor or mortgagor

of any mortgage, deed of trust or other instrument intended to secure the payment of money or the performance of any other obligation, together with the bond, note or other instrument secured thereby, or by exhibition of the mortgage, deed of trust or other instrument alone if such instrument itself sets forth the obligation secured or other obligation to be performed and does not call for or recite any note, bond or other instrument secured by it, if at the time of exhibition, all such instruments are more than ten years old counting from the maturity date of the last obligation secured. If the instrument or instruments so exhibited have an endorsement of partial payment, satisfaction, performance or discharge within the said period of ten years, the period of ten years shall be counted from the date of the most recent endorsement.

The register of deeds shall make proper entry of cancellation and satisfaction of said instrument on the margin of the record where the same is recorded, whether there be any such entries on the original papers or not.

(4) By exhibition to the register of deeds of any deed of trust given to secure the bearer or holder of any negotiable instruments transferable by delivery, together with all the evidences of indebtedness secured thereby, marked paid and satisfied in full and signed by the bearer or holder thereof.

Upon exhibition of the deed of trust, and the evidences of indebtedness properly marked, the register of deeds shall cancel such deed of trust by entry of satisfaction upon the margin of the record, which entry shall be valid and binding upon all persons, if no person rightfully entitled to the deed of trust or evidences of indebtedness has previously notified the register of deeds in writing of the loss or theft of the instrument or evidences of indebtedness and has caused the register of deeds to record the notice or loss or theft on the margin of the record of the deed of trust.

Upon receipt of written notice of loss or theft of the deed of trust or evidences of indebtedness the register of deeds shall make on the record of the deed of trust concerned a marginal entry in writing thereof, with the date of receipt of the notice. The deed of trust shall not be cancelled after such marginal entry until the ownership of said instrument shall have been lawfully determined. Nothing in this subdivision (4) shall be construed to impair the negotiability of any instrument otherwise properly negotiable, nor to impair the rights of any innocent purchaser for value thereof.

Every entry of acknowledgment of satisfaction or of satisfaction made or witnessed by the register of deeds as provided in subdivision (a) (1) shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee or representative in such deed or mortgage as if a deed of release or reconveyance thereof had been duly executed and recorded.

(b) It shall be conclusively presumed that the conditions of any deed of trust, mortgage or other instrument securing the payment of money or securing the performance of any other obligation or obligations have been complied with or the debts secured thereby paid or obligations performed, as against creditors or purchasers for valuable consideration from the mortgagor or grantor, from and after the expiration of fifteen years from whichever of the following occurs last:

(1) The date when the conditions of such instrument were required by its terms to have been performed, or
(2) The date of maturity of the last installment of debt or interest secured thereby;

provided that the holder of the indebtedness secured by such instrument or party secured by any provision thereof may file an affidavit with the register of deeds which affidavit shall specifically state:

(1) The amount of debt unpaid, which is secured by said instrument; or
(2) In what respect any other condition thereof shall not have been complied with; or

may make on the margin of the record of the instrument a notation signed by the holder or party secured and witnessed by the register of deeds stating:

(1) Any payments that have been made on the indebtedness or other obligation secured by such instrument including the date and amount of payments and
(2) The amount still due or obligations not performed under the instrument.

The effect of the filing of the affidavit or of the notation made as herein provided shall be to postpone the effective date of the conclusive presumption of satisfaction to a date fifteen years from the filing of the affidavit or from the making of the notation. There shall be only one postponement of the effective date of the conclusive presumption provided for herein. The register of deeds shall record the affidavit provided for herein and shall make a reference on the margin of the record of the instrument referred to therein to the filing of such affidavit and to the book and page where the affidavit is recorded. This subsection shall not apply to any deed, mortgage, deed of trust or other instrument made or given by any railroad company, or to any agreement of conditional sale, equipment trust agreement, lease, chattel mortgage or other instrument relating to the sale, purchase or lease of railroad equipment or rolling stock, or of other personal property.

(c) In any county in which deeds of trust and mortgages are recorded in the office of the register of deeds by microphotographic process or any other method or process which renders impractical or impossible the subsequent entry of marginal notations upon the records of instruments, the register of deeds, in lieu of making entries of acknowledgment, of satisfaction or of cancellation and satisfaction, shall require the submission for recordation of a notice of satisfaction sufficient to comply with the provisions of G.S. 45-37.2.

(d) For the purposes of this section "register of deeds" means the register of deeds, his deputies or assistants of the county in which the mortgage, deed of trust, or other instrument intended to secure the payment of money or performance of other obligation is registered.

(e) Any transaction subject to the provisions of the Uniform Commercial Code, chapter 25 of the General Statutes, is controlled by the provisions of that act and not by this section. (1870-1, c. 217; Code, s. 1271; 1891, c. 180; 1893, c. 36; 1901, c. 46; Rev., s. 1046; 1917, c. 49, s. 1; c. 50, s. 1; C. S., s. 2594; 1923, c. 192, s. 1; c. 195; 1935, c. 47; 1945, c. 988; 1947, c. 880; 1951, c. 292, s. 1; 1967, c. 765, ss. 1-5; 1969, c. 746.)

Editor's Note.— The 1969 amendment, effective Jan. 1, 1970, rewrote this section as previously amended in 1967.

For article concerning the quest for clear land titles in North Carolina, see 44 N.C.L. Rev. 89 (1965).

Registration of Collateral Instrument as Notice.—A purchaser is presumed to have examined each recorded deed or instrument in his line of title and to know its contents. He is not required to take notice of and examine recorded collateral instruments and documents which are not muniments of his title and are not referred to by the instruments in his chain of title. One need only to look to the muniments of title. Vitiating facts must appear in deraigning title, on the face of deeds in the chain of title, and in one of the muniments of title. Morehead v. Harris, 4 N.C. App. 235, 166 S.E.2d 476 (1969).

§ 45-37.2. Recording satisfactions of deeds of trust and mortgages in counties using microfilm. — In any county in which deeds of trust and mortgages are recorded in the office of the register of deeds by a microphotographic process or by any other method or process which renders impractical or impossible the subsequent entering of marginal notations upon the records of instruments, the register of deeds shall record the satisfaction and cancel the record of each such instrument satisfied by recording a notice of satisfaction which shall consist of a separate instrument, or that part of the original deed of trust or mortgage re-recorded, reciting the names of all parties to the original instrument, the amount of the obligation secured, the date of satisfaction of the obligation, the appropriate entry of satisfaction as provided in G.S. 45-37, a reference by book and page number to the record of the instrument satisfied, and the date of recording the notice of satisfaction. (1963, c. 1021, s. 1; 1967, c. 765, s. 6.)

Editor's Note.—The 1967 amendment deleted the former last sentence, relating to entries in the alphabetical indexes kept by register of deeds.

Article 5.

Miscellaneous Provisions.

§ 45-45. Spouse of mortgagor included among those having right to redeem real property.

Allegations of defendant that her husband conveyed property to a trustee without her joinder for the purpose of defeating her right to protect the property from a prior deed of trust, which contained her joinder, fail to state facts constituting a defense or counterclaim in an action in ejectment, since the husband's conveyance without her joinder does not prevent her from exercising her right to redemption from the prior deed of trust. Peoples Oil Co. v. Richardson, 271 N.C. 696, 157 S.E.2d 369 (1967).

§ 45-45.1. Release of mortgagor by dealings between mortgagee and assuming grantee.

Editor's Note.—For comment on application of statute of limitations to promise of grantee assuming mortgage or deed of trust, see 43 N.C.L. Rev. 966 (1965).

Article 6.

Uniform Trust Receipts Act.

§§ 45-46 to 45-66: Repealed by Session Laws 1965, c. 700, s. 2, effective at midnight June 30, 1967.

Article 7.

Instruments to Secure Future Advances and Future Obligations.

§ 45-67. Definition.—As used in this article, "security instrument" means a mortgage, deed of trust, or other instrument relating to real property securing an obligation or obligations to a person, firm, or corporation specifically named

in such instrument, as distinguished from being included in a class of security holders referred to therein, for the payment of money. (1969, c. 736, s. 1.)

Editor's Note. — Session Laws 1969, c. 736, s. 3, makes the act effective Oct. 1, 1969.

§ **45-68. Requirements.**—A security instrument, otherwise valid, shall secure future obligations which may from time to time be incurred thereunder so as to give priority thereto as provided in G.S. 45-70, if:

(1) Such security instrument shows:

a. That it is given wholly or partly to secure future obligations which may be incurred thereunder;

b. The amount of present obligations secured, and the maximum amount, including present and future obligations, which may be secured thereby at any one time;

c. The period within which such future obligations may be incurred, which period shall not extend more than ten years beyond the date of the security instrument; and

(2) At the time of incurring any such future obligations, each obligation is evidenced by a written instrument or notation, signed by the obligor and stipulating that such obligation is secured by such security instrument; and

(3) At any time a security instrument securing future advances is transferred or assigned by the owner thereof that the amount, date and due date of each note, bond, or other undertaking for the payment of money representing a future obligation secured by such security instrument be noted in writing thereon. (1969, c. 736, s. 1.)

§ **45-69. Fluctuation of obligations within maximum amount.**—Unless the security instrument provides to the contrary, if the maximum amount has not been advanced or if any obligation secured thereby is paid or is reduced by partial payment, further obligation may be incurred from time to time within the time limit fixed by the security instrument, provided the unpaid balance of principal outstanding shall never exceed the maximum amount authorized pursuant to G.S. 45-68 (1) b. Such further obligations shall be secured to the same extent as original obligations thereunder, if the provisions of G.S. 45-68 (2) and (3) are complied with. (1969, c. 736, s. 1.)

§ **45-70. Priority of security instrument.** — (a) Any security instrument which conforms to the requirements of this article and which on its face shows that the making of future advances is obligatory, shall, from the time and date of registration thereof, have the same priority to the extent of all obligatory future advances secured by it, as if all the advances had been made at the time of the execution of the instrument.

(b) Any security instrument which conforms to the requirements of this article, which on its face does not show that the making of future advances is obligatory, shall, from the time and date of registration thereof, have the same priority to the extent of all obligations secured by it, as if all the advances had been made at the time of the execution of the instrument, except that when an intervening lienor or encumbrancer gives actual notice as hereinafter provided that an intervening lien or encumbrance has been perfected on the property covered by the security instrument, or is being incurred and when perfected will relate back to the time when incurred, any future advances made subsequent to the receipt of such notice shall not take priority over such intervening perfected lien or encumbrance. Such notice shall be in writing and shall be given to the secured creditor named in the security instrument; but if the security instrument is registered and if any assignment of the security instrument has been noted on the

margin of the record showing the name and address of the assignee, such notice shall be given to the last assignee so noted at the address so shown.

(c) Payments made by the secured creditor for fire and extended coverage insurance, taxes, assessments, or other necessary expenditures for the preservation of the security shall be secured by the security instrument and shall have the same priority as if such payments had been made at the time of the execution of the instrument, whether or not notice has been given as provided in subsection (b) of this section. The provisions of G.S. 45-68 (2) and (3) shall not be applicable to such payments, nor shall such payments be considered in computing the maximum amount which may be secured by the instrument. (1969, c. 736, s. 1.)

§ **45-71. Satisfaction of the security instrument.**—Upon payment of all the obligations secured by a security instrument which conforms to the requirements of this article and upon termination of all obligation to make advances, and upon written demand made by the maker of the security instrument, his successor in interest, or anyone claiming under him, the holder of the security instrument is hereby authorized to and shall make a written entry upon the security instrument showing payment and satisfaction of the instrument, which entry he shall date and sign. When the security instrument secures notes, bonds, or other undertakings for the payment of money which have not already been entered on the security instrument as paid, the holder of the security instrument, unless payment was made to him, may require the exhibition of all such evidences of indebtedness secured by the instrument marked paid before making his entry showing payment and satisfaction. (1969, c. 736, s. 1.)

§ **45-72. Termination of future optional advances.**—(a) The holder of a security instrument conforming to the provisions of this article, which on its face does not show that the making of future advances is obligatory, shall, at the request of the maker of the security instrument or his successor in title promptly furnish to him a statement duly executed and acknowledged in such form as to meet the requirements for the execution and acknowledgment of deeds, setting forth in substance the following:

> "This is to certify that the total outstanding balance of all obligations, the payment of which is secured by that certain instrument executed by ....., dated ....., recorded in book ..... at page ..... in the office of the Register of Deeds of ..... County, North Carolina, is $....., of which amount $..... represents principal.
> "No future advances will be made under the aforesaid instrument, except such expense as it may become necessary to advance to preserve the security now held.
> "This ..... day of ....., 19.....
> .....
> (Signature and Acknowledgment)"

(b) Such statement, when duly executed and acknowledged, shall be entitled to probate and registration, and upon filing for registration shall be effective from the date of the statement. It shall have the effect of limiting the lien or encumbrance of the holder of the security instrument to the amount therein stated, plus any necessary advances made to preserve the security, and interest on the unpaid principal. It shall bar any further advances under the security instrument therein referred to except such as may be necessary to preserve the security then held as provided in G.S. 45-70 (c). (1969, c. 736, s. 1.)

§ **45-73. Cancellation of record; presentation of notes described in security instrument sufficient.**—The provisions of G.S. 45-37 apply to discharge of record of instruments executed under this article except that in cases

of cancellation by exhibition or presentation under G.S. 45-37 (a) (2) or G.S. 45-37 (a) (3), only notes or bonds described in the body of the instrument or noted in writing thereon as provided in G.S. 45-68 (3) need be exhibited or presented. (1969, c. 736, s. 1.)

§ 45-74. Article not exclusive.—The provisions of this article shall not be deemed exclusive, and no security instrument securing future advances or future obligations which is otherwise valid shall be invalidated by failure to comply with the provisions of this article. (1969, c. 736, s. 1.)

Chapter 46.

Partition.

Article 1.

Partition of Real Property.

Article 1.

Partition of Real Property.

§ 46-3. Petition by cotenant or personal representative of cotenant.

I. IN GENERAL.

In this State partition proceedings have been consistently held to be equitable in nature, and the court has jurisdiction to adjust all equities in respect to the property. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

And Petitioner Must Do Equity.—Partition is always subject to the principle that he who seeks it by coming into equity for relief must do equity. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

Tenant in Common Is Entitled, etc.—

Prima facie, a tenant in common is entitled, as a matter of right, to a partition of the lands so that he may enjoy his share in severalty. If, however, an actual partition cannot be made without injury to some or all of the parties interested, he is equally entitled to a partition by sale. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

But Tenant in Common May Waive Right by Contract.—While it is the general rule that a tenant in common may have partition as a matter of right, it is equally well established that a cotenant may, either by an express or implied contract, waive his right to partition for a reasonable time. When he does, partition will be denied him or his successors who take with notice. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

Equity will not award partition at the suit of one in violation of his own agreement or in violation of a condition or restriction imposed on the estate by one through whom he claims. The objection to partition in such cases is in the nature of an estoppel. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

The refusal of partition to one who has brought suit therefor in violation of his contract appears to bear a close analogy to the grant of specific performance of a contract. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

Burden of Proof.—The burden is on him who seeks a sale in lieu of actual partition to allege and prove the facts upon which the order of sale must rest. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

Nonsuit. — General rules governing involuntary termination on nonsuits in civil actions apply to special proceedings for partition. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

If the petitioner has no interest in the lands described in the petition, or no present right to partition, the proceeding is properly dismissed. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

§ 46-17.1. Dedication of streets.—Upon motion of any party or the commissioners appointed to make division, the clerk may authorize the commissioners to propose and report the dedication of such portions of the land as are necessary

as a means of access to any share, or is otherwise advisable for public or private highways, streets or alleys, and such proposal shall be acted upon by the clerk as a part of the report and, if approved, shall constitute a dedication. No interest of a minor or other person under disability shall be affected thereby until such dedication is approved by a judge of the superior court. (1969, c. 45.)

ARTICLE 2.

Partition Sales of Real Property.

§ 46-22. Sale in lieu of partition.

Tenants in common are entitled, etc.—

Prima facie, a tenant in common is entitled, as a matter of right, to a partition of the lands so that he may enjoy his share in severalty. If, however, an actual partition cannot be made without injury to some or all of the parties interested, he is equally entitled to a partition by sale. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

The burden, etc.—

The burden is on him who seeks a sale in lieu of actual partition to allege and prove the facts upon which the order of sale must rest. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

Life Estate Does Not Bar Sale of Reversion or Remainder.—The existence of a life estate is not, per se, "a bar to a sale for partition of the remainder or reversion thereof," since, for the purpose of partition, tenants in common are deemed seized and possessed as if no life estate existed. The actual possession of the life tenant, however, cannot be disturbed so long as it exists. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

§ 46-23. Remainder or reversion sold for partition; outstanding life estate.

Rule under Section.—The existence of a life estate is not, per se, "a bar to a sale for partition of the remainder or reversion thereof," since, for the purpose of partition, tenants in common are deemed seized and possessed as if no life estate existed. The actual possession of the life tenant, however, cannot be disturbed so long as it exists. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

§ 46-34. Shares to persons unknown or not sui juris secured.

Cited in In re Estate of Nixon, 2 N.C. App. 422, 163 S.E.2d 274 (1968).

ARTICLE 4.

Partition of Personal Property.

§ 46-42. Personal property may be partitioned; commissioners appointed.

Editor's Note.—For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966).

Chapter 47.
Probate and Registration.

Article 1.

Probate.

§ 47-1. Officials of State authorized to take probate.—The execution of all deeds of conveyance, contracts to buy, sell or convey lands, mortgages, deeds of trust, instruments modifying or extending the terms of mortgages or deeds of trust, assignments, powers of attorney, covenants to stand seized to the use of another, leases for more than three years, releases, affidavits concerning land titles or family history, any instruments pertaining to real property, and any and all instruments and writings of whatever nature and kind which are required or allowed by law to be registered in the office of the register of deeds or which may hereafter be required or allowed by law to be so registered, may be proved or acknowledged before any one of the following officials of this State: The justices, judges, magistrates, clerks, assistant clerks, and deputy clerks of the General Court of Justice, the judges and clerks of courts inferior to the superior court, commissioners of affidavits appointed by the Governor of this State, notaries public, and the several justices of the peace. (Code, s. 1246; 1895, c. 161, ss. 1, 3; 1897, c. 87; 1899, c. 235; Rev., s. 989; C. S., s. 3293; 1951, c. 772; 1969, c. 44, s. 52.)

Editor's Note.—The 1969 amendment rewrote the portion of the section which follows the colon.

For article, "Toward Greater Marketability of Land Titles—Remedying the Defective Acknowledgment Syndrome," see 46 N.C.L. Rev. 56 (1967).

§ 47-2. Officials of the United States, foreign countries, and sister states.—The execution of all such instruments and writings as are permitted or required by law to be registered may be proved or acknowledged before any one of the following officials of the United States, of the District of Columbia, of the several states and territories of the United States, of countries under the dominion of the United States and of foreign countries: Any judge of a court of record, any clerk of a court of record, any notary public, any commissioner of deeds, any commissioner of oaths, any mayor or chief magistrate of an incorporated town or city, any ambassador, minister, consul, vice-consul, consul general, vice-consul general, or commercial agent of the United States, any justice of the peace of any state or territory of the United States, any officer of the army or air force of the United States or United States marine corps having the rank of warrant officer or higher, any officer of the United States navy or coast guard having the rank of

warrant officer, or higher, or any officer of the United States merchant marine having the rank of warrant officer, or higher. No official seal shall be required of said military, naval or merchant marine official, but he shall sign his name, designate his rank, and give the name of his ship or military organization and the date, and for the purpose of certifying said acknowledgment, he shall use a form in substance as follows:

On this the ..... day of ....., 19...., before me ....., the undersigned officer, personally appeared ....., known to me (or satisfactorily proven) to be accompanying or serving in or with the armed forces of the United States (or to be the spouse of a person accompanying or serving in or with the armed forces of the United States) and to be the person whose name is subscribed to the within instruments and acknowledged that ..... he ..... executed the same for the purposes therein contained. And the undersigned does further certify that he is at the date of this certificate a commissioned officer of the rank stated below and is in the active service of the armed forces of the United States.

.....
Signature of Officer

.....
Rank of Officer and command to which attached.

If the proof or acknowledgment of the execution of an instrument is had before a justice of the peace of any state of the United States other than this State or of any territory of the United States, the certificate of such justice of the peace shall be accompanied by a certificate of the clerk of some court of record of the county in which such justice of the peace resides, which certificate of the clerk shall be under his hand and official seal, to the effect that such justice of the peace was at the time the certificate of such justice bears date an acting justice of the peace of such county and state or territory and that the genuine signature of such justice of the peace is set to such certificate. (1899, c. 235, s. 5; 1905, c. 451; Rev., s. 990; 1913, c. 39, s. 1; Ex. Sess. 1913, c. 72, s. 1; C. S., s. 3294; 1943, c. 159, s. 1; c. 471, s. 1; 1945, c. 6, s. 1; 1955, c. 658, s. 1; 1957, c. 1084, s. 1; 1967, c. 949.)

Editor's Note.— The 1967 amendment added the words within the second set of parentheses in the form.

§ **47-5. When seal of officer necessary to probate.**—When proof or acknowledgment of the execution of any instrument by any maker of such instrument, whether a married woman or other person or corporation, is had before any official authorized by law to take such proof and acknowledgment, and such official has an official seal, he shall set his official seal to his certificate. If the official before whom the instrument is proved or acknowledged has no official seal he shall certify under his hand, and his private seal shall not be essential. When the instrument is proved or acknowledged before the register of deeds of the county in which the instrument is to be registered, the official seal shall not be necessary. (1899, c. 235, s. 8; Rev., s. 993; C. S., s. 3297; 1969, c. 664, s. 3.)

Editor's Note.—The 1969 amendment, effective July 1, 1969, substituted "register of deeds" for "clerk or deputy clerk of the superior court" in the last sentence.

§ **47-7. Probate where clerk is a party.**—All instruments required or permitted by law to be registered to which clerks of the superior court are parties, or in which such clerks are interested, may be proved or acknowledged and the acknowledgment of any married woman may be taken before any justice of the peace or notary public of the county of said clerk which clerk may then under his hand and official seal certify to the genuineness thereof. Such proofs and acknowledgments may also be taken before any justice or judge of the General Court of Justice, and the instruments may be probated and ordered to be registered by such judge or justice, in like manner as is provided by law for probates by clerks of the superior court in other cases. Provided, that nothing contained

herein shall prevent the clerk of the superior court who is a party to any instrument, or who is a stockholder or officer of any bank or other corporation which is a party to any instrument, from adjudicating and ordering such instruments for registration as have been acknowledged or proved before some justice of the peace or notary public. All probates, adjudications and orders of registration made prior to January first, one thousand nine hundred and thirty, by any such clerk of conveyances or other papers in which said clerk is an interested party, or other papers by any corporation in which such clerk also is an officer or stockholder, are hereby validated and declared sufficient for all such purposes. (1891, c. 102; 1893, c. 3; Rev., s. 995; 1913, c. 148, s. 1; C. S., s. 3299; 1921, c. 92; c. 106, s. 2; 1939, c. 210, s. 1; 1945, c. 73, s. 10; 1969, c. 44, s. 53.)

Editor's Note.—The 1969 amendment substituted "justice or judge of the General Court of Justice" for "judge of the superior court or justice of the Supreme Court" in the second sentence.

§ 47-14. Register of deeds to pass on certificate and register instruments; order by judge.—(a) When the proof or acknowledgment of the execution of any instrument, required or permitted by law to be registered, is had before any other official than the register of deeds of the county in which the instrument is offered for registration, the register of deeds shall examine the certificate or certificates of proof or acknowledgment appearing upon the instrument, and if it appears on the face of the instrument that the execution thereof by one or more of the signers has been duly proved or acknowledged and the certificate or certificates to that effect are in due form, he shall so certify, and shall register the instrument, together with the certificates. No certification is required when the proof or acknowledgment is before the register of deeds of the county in which the instrument is offered for registration.

(b) If a register of deeds denies registration pursuant to subsection (a), the person offering the instrument for registration may present the instrument to a judge, as provided in subsection (c), and he shall examine the certificate or certificates of proof or acknowledgment appearing upon the instrument, and if it appears on the face of the instrument that the execution thereof by one or more of the signers has been duly proved or acknowledged and the certificates to that effect are in due form, he shall so adjudge, and shall order the instrument to be registered, together with the certificates, and the register of deeds shall register them accordingly.

(c) When a district court has been established in the district including the county in which the instrument is to be registered, application for an order for registration pursuant to subsection (b) shall be made to any judge of the district court in the district including the county in which the instrument is to be registered. Until a district court has been established, application for an order for registration pursuant to subsection (b) may be made to a resident judge of superior court residing in the district including the county in which the instrument is to be registered, a judge regularly holding the superior courts of the district including the county in which the instrument is to be registered, any judge holding a session of superior court, either civil or criminal, in the district including the county in which the instrument is to be registered, or a special judge of superior court residing in the district including the county in which the instrument is to be registered.

(d) Registration of an instrument pursuant to this section is not effective with regard to parties who have not executed the instrument or whose execution thereof has not been duly proved or acknowledged. (1899, c. 235, s. 7; 1905, c. 414; Rev., s. 999; C. S., s. 3305; 1921, c. 91; 1939, c. 210, s. 2; 1967, c. 639, s. 1; 1969, c. 664, s. 2.)

Editor's Note.—The 1967 amendment, effective Oct. 1, 1967, rewrote this section. The 1969 amendment, effective July 1, 1969, rewrote subsection (a).

Opinions of Attorney General. — Miss Frances H. Burwell, Stokes County Register of Deeds, 7/8/69.

ARTICLE 2.

Registration.

§ 47-17.1. Documents registered or ordered to be registered in certain counties to designate draftsman; exceptions.—The registers of deeds of the counties named below shall not accept for registration, nor shall any judge order registration pursuant to G.S. 47-14, of any papers or documents, with the exception of holographic wills, executed after July 1, 1953, unless there shall appear on the cover page of said papers or documents following the words "drawn by" the signature of the person who drafted said papers or documents, or unless in some other manner the cover page shall clearly designate the draftsman of such document: Provided that papers or documents prepared in other counties of North Carolina or in other states or counties for registration in any of said counties, or papers or documents prepared by any party to such papers or documents may be registered or ordered to be registered without such designation on the cover page of such papers or documents. This section shall apply to the following counties only: Alamance, Alexander, Buncombe, Carteret, Catawba, Chatham, Cherokee, Craven, Cumberland, Davidson, Duplin, Durham, Gaston, Gates, Graham, Johnston, Lincoln, McDowell, Madison, Mecklenburg, Montgomery, New Hanover, Orange, Pamlico, Perquimans, Pitt, Randolph, Rowan, Surry, Swain, Transylvania, Union, Wake, Watauga and Wilkes. (1953, c. 1160; 1955, cc. 54, 59, 87, 88, 264, 280, 410, 628, 655; 1957, cc. 431, 469, 932, 982, 1119, 1290; 1959, cc. 266, 312, 548, 589; 1961, cc. 789, 1167; 1965, cc. 160, 597, 830; 1967, cc. 42, 139; c. 639, s. 2; c. 658; 1969, c. 10.)

Editor's Note.—

The first 1967 amendment made this section applicable to Carteret County, and the second 1967 amendment made it applicable to Craven County.

The third 1967 amendment, effective Oct. 1, 1967, substituted "The registers of deeds of the counties named below shall not accept for registration, nor shall any judge order registration pursuant to G.S. 47-14, of" for "The clerks of the superior courts of the counties named below shall not accept for probate or recordation" at the beginning of the section, and substituted "registration" for "probate or recordation" and "may be registered or ordered to be registered" for "may be accepted for probate or recordation" in the proviso to the first sentence.

The fourth 1967 amendment made this section applicable to Pamlico County.

The 1969 amendment made this section applicable to Pitt County.

Session Laws 1955, c. 273, referred to in the replacement volume, was amended by Session Laws 1967, c. 742.

§ 47-18. Conveyances, contracts to convey and leases of land.

I. IN GENERAL.

Editor's Note.—

For article concerning the quest for clear land titles in North Carolina, see 44 N.C.L. Rev. 89 (1965). For case law survey as to recordation, see 44 N.C.L. Rev. 1032 (1966).

III. WHAT INSTRUMENTS AFFECTED.

A tobacco acreage allotment is not within the purview of this section. Hart v. Hassell, 250 F. Supp. 893 (E.D.N.C. 1966).

V. NOTICE.

No Notice, etc.—

An unrecorded contract to convey land is not valid as against a subsequent purchaser for value, or those holding under such a purchaser, even though he acquired title with actual notice of the contract. Beasley v. Wilson, 267 N.C. 95, 147 S.E.2d 577 (1966).

§ 47-18.1. Registration of certificate of corporate merger or consolidation.—(a) If title to real property in this State is transferred by operation of law upon the merger or consolidation of two or more corporations, such transfer is effective against lien creditors or purchasers for a valuable consideration from the corporation formerly owning the property, only from the time of registration of a certificate thereof as provided in this section, in the county where the land

lies, or if the land is located in more than one county, then in each county where any portion of the land lies to be effective as to the land in that county.

(b) The Secretary of State shall adopt uniform certificates of merger or consolidation, to be furnished for registration, and shall adopt such fees as are necessary for the expense of such certification.

(c) A certificate of the Secretary of State prepared in accordance with this section shall be registered by the register of deeds in the same manner as deeds, and for the same fees, but no formalities as to acknowledgment, probate, or approval by any other officer shall be required. The name of the corporation formerly owning the property shall appear in the "Grantor" index, and the name of the corporation owning the property by virtue of the merger or consolidation shall appear in the "Grantee" index. (1967, c. 950, s. 3.)

Editor's Note. — The act inserting this section is effective on and after Oct. 1, 1967.

§ 47-20. Deeds of trust, mortgages and conditional sales contracts; effect of registration. — No deed of trust or mortgage of real or personal property, or of a leasehold interest or other chattel real, or conditional sales contract of personal property in which the title is retained by the vendor, shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the grantor, mortgagor or conditional sales vendee, but from the time of registration thereof as provided in this article; provided however that any transaction subject to the provisions of the Uniform Commercial Code (chapter 25 of the General Statutes) is controlled by the provisions of that act and not by this section. (1829, c. 20; R. C., c. 37, s. 22; Code, s. 1254; Rev., s. 982; 1909, c. 874, s. 1; C. S., s. 3311; 1953, c. 1190, s. 1; 1959, c. 1026, s. 2; 1965, c. 700, s. 8; 1967, c. 562, s. 5.)

I. IN GENERAL.

Editor's Note.—

The 1967 amendment, effective at midnight June 30, 1967, substituted the proviso at the end of the section for the phrase "unless subject to the filing requirements of article 9 of the Uniform Commercial Code (chapter 25 of the General Statutes) and duly filed pursuant thereto." See Editor's note to § 25-1-201.

IV. RIGHTS OF PERSONS PROTECTED.

Trustee in Bankruptcy.—

A trustee in bankruptcy stands in the shoes of a "purchaser for a valuable consideration," from the period of four months prior to the time of the filing of the petition in bankruptcy. In the Matter of Dail, 257 F. Supp. 326 (E.D.N.C. 1966).

VI. PLACE OF REGISTRATION.

The requirements of this section have no application to personal property in transit through or temporarily within North Carolina. National Bank v. Sprinkle, 3 N.C. App. 242, 164 S.E.2d 611 (1968).

Hence, the lien of a mortgage or conditional sale contract validly executed and legally registered according to the laws of the state wherein the property was and the mortgagor resided, will be recognized and enforced in this State against the claims of attaching creditors when the presence of such property in this State is of such a temporary or transient nature that it has not come to rest in the State so as to acquire a situs here. National Bank v. Sprinkle, 3 N.C. App. 242, 164 S.E.2d 611 (1968).

Property Embraced in Instruments Effective in Another State.—The legislature, in enacting this section, made no exception in favor of a conditional sale contract or chattel mortgage executed and effective in another state where the property embraced in such instrument is subsequently brought into this State. National Bank v. Sprinkle, 3 N.C. App. 242, 164 S.E.2d 611 (1968).

§ 47-20.2. Place of registration; personal property.

Applied in In the Matter of Dail, 257 F. Supp. 326 (E.D.N.C. 1966).

§ 47-20.5. Real property; effectiveness of after-acquired property clause.—(a) As used in this section, "after-acquired property clause" means any

provision or provisions in an instrument which create a security interest in real property acquired by the grantor of the instrument subsequent to its execution.

(b) As used in this section, "after-acquired property," and "property subsequently acquired" mean any real property which the grantor of a security instrument containing an after-acquired property clause acquires subsequent to the execution of such instrument, and in which the terms of the after-acquired property clause would create a security interest.

(c) An after-acquired property clause is effective to pass after-acquired property as between the parties to the instrument containing such clause, but shall not be effective to pass title to after-acquired property as against lien creditors or purchasers for a valuable consideration from the grantor of the instrument unless and until such instrument has been reregistered at or subsequent to the time such after-acquired property is acquired by such grantor.

(d) In lieu of reregistering the instrument containing the after-acquired property clause as specified in subsection (c), such instrument may be made effective to pass title to after-acquired property as against lien creditors and purchasers for a valuable consideration from the grantor of the instrument by registering a notice of extension as specified in subsection (e) at or subsequent to the time of acquisition of the after-acquired property by the grantor.

(e) The notice of extension shall

(1) Show that effective registration of the after-acquired property clause is extended,

(2) Include the names of the parties to the instrument containing the after-acquired property clause,

(3) Refer to the book and page where the instrument containing the after-acquired property clause is registered, and

(4) Be signed by the grantee or the person secured by the instrument containing the after-acquired property clause or his successor in interest.

(f) The register of deeds shall index the notice of extension in the same manner as the instrument containing the after-acquired property clause.

(g) Except as provided in subsection (h) of this section, no instrument which has been heretofore executed or registered and which contains an after-acquired property clause shall be effective to pass title to after-acquired property as against lien creditors or purchasers for a valuable consideration from the grantor of such instrument unless and until such instrument or a notice of extension thereof has been registered or reregistered as herein provided.

(h) Notwithstanding the provisions of this section with respect to registration, reregistration and registration of notice of extension, an after-acquired property clause in an instrument which creates a security interest made by a public utility as defined in G.S. 62-3 (23) or a natural gas company as defined in section 2(6) of the Natural Gas Act, 15 U.S.C.A. 717a (6), or by an electric or telephone membership corporation incorporated or domesticated in North Carolina shall be effective to pass after-acquired property as against lien creditors or purchasers for a valuable consideration from the grantor of the instrument from the time of original registration of such instrument. (1967, c. 861, s. 1; 1969, c. 813, ss. 1-3.)

Editor's Note. — In Session Laws 1967 this section was numbered 47-20.1. Since this chapter in the replacement volume already contained sections numbered 47-20.1 through 47-20.4, the section added by Session Laws 1967 has been renumbered 47-20.5 herein.

Section 3, c. 861, Session Laws 1967, provides that the act shall become effective at midnight on June 30, 1967, and shall apply to all instruments registered after that date.

The 1969 amendment, effective after midnight on Sept. 30, 1969, and applicable to all instruments registered after that date, rewrote subsections (c) and (d) and added subsections (g) and (h). Session Laws 1969, c. 813, s. 4, provides: "This act shall not affect any case the litigation of which is pending upon its effective date."

§ 47-27. Deeds of easements.

This section is expressly applicable to the Highway Commission. North Carolina State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

Deeds of Easements Invalid Prior to Recordation. — This section makes deeds and conveyances of easements and rights-of-way invalid as to creditors and purchasers for value prior to recordation. North Carolina State Highway Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

Facts Constituting Notice.—If the facts disclosed in an instrument appearing in a purchaser's chain of title would naturally lead an honest and prudent person to make inquiry concerning the rights of others, these facts constituted notice of everything which such inquiry, pursued in good faith and with reasonable diligence, would have disclosed. North Carolina State Highway Comm'n v. Wortman, 4 N.C. App. 546, 167 S.E.2d 462 (1969).

Map or Plat as Part of Deed.—A map or plat referred to in a deed becomes a part of the deed and need not be registered. North Carolina State Highway Comm'n v. Wortman, 4 N.C. App. 546, 167 S.E.2d 462 (1969).

§ 47-30. Plats and subdivisions; mapping requirements.

(k) The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Anson, Ashe, Beaufort, Brunswick, Camden, Caswell, Cherokee, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lenoir, Lincoln, McDowell, Madison, Martin, Mitchell, Northampton, Pamlico, Pasquotank, Pender, Perquimans, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Tyrrell, Union, Vance, Warren, Washington, Watauga and Yadkin.

(l) The provisions of this section shall not apply to the registration of highway right-of-way plans provided for in G.S. 136-19.4. (1911, c. 55, s. 2; C. S., s. 3318; 1923, c. 105; 1935, c. 219; 1941, c. 249; 1953, c. 47, s. 1; 1959, c. 1235, ss. 1, 3A, 3.1; 1961, cc. 7, 111, 164, 199, 252, 660, 687, 932, 1122; 1963, c. 71, ss. 1, 2; cc. 180, 236; c. 361, s. 1; c. 403; 1965, c. 139, s. 1; 1967, c. 228, s. 2; c. 394.)

Editor's Note.—

The first 1967 amendment, effective July 1, 1967, added subsection (l).

The second 1967 amendment inserted "McDowell" in subsection (k).

As the rest of the section was not changed by the amendments, only subsections (k) and (l) are set out.

Article 3.

Forms of Acknowledgment, Probate and Order of Registration.

§ 47-37. Certificate and adjudication of registration.—(a) The form of certification for registration by the register of deeds pursuant to § 47-14 (a) shall be substantially as follows:

North Carolina, ... County.

The foregoing (or annexed) certificate of (here give name and official title of the officer signing the certificate passed upon) is certified to be correct.

This ..... day of ....., A.D. .....

.....Signature.....
Register of Deeds

(b) The form of adjudication and order of registration by a judge pursuant to § 47-14 (b) and (c) shall be substantially as follows:

North Carolina, ... County.

The foregoing (or annexed) certificate of (here give name and official title of the officer signing the certificate passed upon) is adjudged to be correct. Let the instrument and the certificate be registered.

This ..... day of ....., A.D. .....

.....
(Signature of Judge)

(1899, c. 235, s. 7; 1905, c. 344; Rev., ss. 1001, 1010; C. S., s. 3322; 1967, c. 639, s. 3.)

Editor's Note.—The 1967 amendment, effective Oct. 1, 1967, rewrote this section.

§ 47-39. Form of acknowledgment of conveyances and contracts between husband and wife.—When an instrument or contract purports to be signed by a married woman and such instrument or contract comes within the provisions of G.S. 52-6 of the General Statutes, the form of certificate of her acknowledgment before any officer authorized to take the same shall be in substance as follows:

North Carolina, ... County.

I (here give name of the official and his official title), do hereby certify that (here give name of the married woman who executed the instrument), wife of (here give husband's name), personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument; and the said (here give married woman's name), being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, does state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she does still voluntarily assent thereto.

And I do further certify that it has been made to appear to my satisfaction, and I do find as a fact, that the same is not unreasonable or injurious to her.

Witness my hand and (when an official seal is required by law) official seal, this ..... (day of month), A. D. ..... (year).
(Official seal)

.....
(Signature of officer.)

(1899, c. 235, s. 8; 1901, c. 637; Rev., s. 1003; C. S., s. 3324; 1945, c. 73, s. 14; 1957, c. 1229, s. 2; 1967, c. 24, s. 26.)

Editor's Note.—The 1967 amendment, originally effective Oct. 1, 1967, substituted "52-6" for "52-12" in the opening paragraph. Session Laws 1967, c. 1078, amends the 1967 amendatory act so as to make it effective July 1, 1967.

When Wife's Deed Void.—

The deed of a wife, conveying land to her husband, is void unless the probating officer in his certificate of probate certify that, at the time of its execution and her privy examination, the deed is not unreasonable or injurious to her. Trammell v. Trammell, 2 N.C. App. 166, 162 S.E.2d 605 (1968).

Applied in Mitchell v. Mitchell, 270 N.C. 253, 154 S.E.2d 71 (1967).

§ 47-41. Corporate conveyances.

A corporate seal is a necessary prerequisite to a valid conveyance of real estate by a corporation. Investors Corp. v. Field Financial Corp., 5 N.C. App. 156, 167 S.E.2d 852 (1969).

This section sets out the forms of probate for a deed and other conveyances executed by a corporation and reveals the necessity of having a corporate seal. Investors Corp. v. Field Financial Corp., 5 N.C. App. 156, 167 S.E.2d 852 (1969).

What Does Not, etc.—

In Withrell v. Murphy, 154 N.C. 82, 69 S.E. 748 (1910), where the corporate seal had been affixed to a deed of conveyance, but the acknowledgment by the corporate officers failed to acknowledge that the seal so affixed was the seal of the corporation, the Supreme Court held that this conveyance was, therefore, ineffectual as to the corporation's creditors. Investors Corp. v. Field Financial Corp., 5 N.C. App. 156, 167 S.E.2d 852 (1969).

§ 47-43. Form of certificate of acknowledgment of instrument executed by attorney in fact.

Cited in In re Sale of Land of Warrick, 1 N.C. App. 387, 161 S.E.2d 630 (1968).

Article 4.

Curative Statutes; Acknowledgments; Probates; Registration.

§ 47-47. Defective order of registration; "same" for "this instrument".

Editor's Note.—For article, "Toward Greater Marketability of Land Titles — Remedying the Defective Acknowledgment Syndrome," see 46 N.C.L. Rev. 56 (1967).

§ 47-71.1. Corporate seal omitted prior to January, 1967. — Any corporate deed, or conveyance of land in this State, made prior to January 1, 1967, which is defective only because the corporate seal is omitted therefrom is hereby declared to be a good and valid conveyance by such corporation for all purposes and shall be sufficient to pass title to the property therein conveyed as fully as if the said conveyance were executed according to the provisions and forms of law in force in this State at the date of the execution of such conveyance. (1957, c. 500, s. 1; 1963, c. 1015; 1969, c. 815.)

Editor's Note.—

The 1969 amendment substituted "1967" for "1963" near the beginning of the section. The amendatory act provides that it shall not apply to pending litigation.

This section only serves to accentuate the necessity of a corporate seal in order to make a corporate conveyance of real estate valid and effectual. Investors Corp. v. Field Financial Corp., 5 N.C. App. 156, 167 S.E.2d 852 (1969).

§ 47-95. Acknowledgments taken by notaries interested as trustee or holding other office.—In every case where deeds and other instruments have been acknowledged and privy examination of wives had before notaries public, or justices of the peace, prior to January 1, 1969, when the notary public or justice of the peace at the time was interested as trustee in said instrument or at the time was also holding some other office, and the deed or other instrument has been duly probated and recorded, such acknowledgment and privy examination taken by such notary public or justice of the peace is hereby declared to be sufficient and valid. (1923, c. 61; C. S., s. 3366(h); 1931, cc. 166, 438; 1939, c. 321; 1955, c. 696; 1957, c. 1270; 1959, c. 81; 1969, c. 639, s. 1.)

Editor's Note.—

The 1969 amendment substituted "January 1, 1969" for "January 1, 1959." The amendatory act states that it is "the purpose and intent of this act to validate those certain acknowledgments with which G.S. 47-95 deals and which were made before January 1, 1969." Section 2 of the amendatory act provides that the act does not apply to pending litigation.

Article 5.

Registration of Official Discharges from the Military and Naval Forces of the United States.

§ 47-113. Certified copy of registration.—Any person desiring a certified copy of any such discharge, or certificate of lost discharge, registered under the provisions of this article shall apply for the same to the register of deeds of the county in which such discharge or certificate of lost discharge is registered. The register of deeds shall furnish certified copies of instruments registered under this article without charge to any member or former member of the armed

forces of the United States who applies therefor. (1921, c. 198, s. 5; C. S., s. 3366(o); 1945, c. 659, s. 3; 1969, c. 80, s. 11.)

Editor's Note.—Prior to the 1969 amendment, effective July 1, 1969, the section provided for payment of a fee of fifty cents, except by members or former members of the armed forces.

ARTICLE 6.

Execution of Powers of Attorney.

§ 47-115.1. Appointment of attorney in fact which may be continued in effect notwithstanding incapacity or mental incompetence of the principal therein.

(k) In the event that any power of attorney executed pursuant to the provisions of this section does not contain the amount of commissions that the attorney in fact is entitled to receive or the way such commissions are to be determined, and the principal should thereafter become incompetent, the commissions such attorney in fact shall receive shall be fixed in the discretion of the clerk of superior court pursuant to the provisions of G.S. 28-170. (1961, c. 341, s. 1; 1967, c. 1087.)

Editor's Note. — The 1967 amendment added subsection (k). As the rest of the section was not affected by the amendment, it is not set out.

Chapter 47A.

Unit Ownership Act.

§ 47A-3. Definitions.

(1a) "Building" means a building, or a group of buildings, each building containing two or more units, and comprising a part of the property.

(12) "Unit" or "condominium unit" means an enclosed space consisting of one or more rooms occupying all or a part of a floor or floors in a building of one or more floors or stories regardless of whether it be designed for residence, for office, for the operation of any industry or business, or for any other type of independent use and shall include such accessory spaces and areas as may be described in the declaration, such as garage space, storage space, balcony, terrace or patio, provided it has a direct exit to a thoroughfare or to a given common space leading to a thoroughfare.

(1969, c. 848.)

Editor's Note. — The 1969 amendment added subdivision (1a) and inserted "or floors" near the beginning of subdivision (12). As the rest of the section was not changed by the amendment, only subdivisions (1a) and (12) are set out.

Chapter 48.

Adoptions.

§ 48-1. Legislative intent; construction of chapter. — The General Assembly hereby declares as a matter of legislative policy with respect to adoption that—

(1) The primary purpose of this chapter is to protect children from unnecessary separation from parents who might give them good homes and loving care, to protect them from adoption by persons unfit to have the responsibility of their care and rearing, and to protect them from interference, long after they have become properly adjusted in their adoptive homes by natural parents who may have some legal claim because of a defect in the adoption procedure.

(2) The secondary purpose of this chapter is to protect the natural parents from hurried decisions, made under strain and anxiety, to give up a child, and to protect foster parents from assuming responsibility for a child about whose heredity or mental or physical condition they know nothing, and to prevent later disturbance of their relationship to the child by natural parents whose legal rights have not been fully protected.

(3) When the interests of a child and those of an adult are in conflict, such conflict should be resolved in favor of the child; and to that end this chapter should be liberally construed. (1949, c. 300.)

Editor's Note.— This section is set out above to correct an error appearing in the replacement volume.

Session Laws 1967, c. 880, s. 1, effective July 1, 1967, changed the heading of this chapter from "Adoption of Minors" to "Adoptions."

§ 48-2. Definitions.—In this chapter, unless the context or subject matter otherwise requires—

(1) "Adult person" means any person who has attained the age of twenty-one years.

(2) "Licensed child-placing agency" means any agency operating under a license to place children for adoption issued by the State Board of Public Welfare, or in the event that such agency is in another state or territory or in the District of Columbia, operating under a license to place children for adoption issued by a governmental authority of such state, territory, or the District of Columbia, empowered by law to issue such licenses.

(3a) For the purpose of this chapter, an abandoned child shall be any child under the age of eighteen years who has been willfully abandoned at least six consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child. A child may be willfully abandoned by his or her legal or natural father, within the meaning of this section, if the mother of the child had been willfully abandoned by and was living separate and apart from the

father at the time of the child's birth, although the father may not have known of such birth; but in any event said child must be over the age of three months and under the age of eighteen years at the time of institution of the action or proceeding to declare the child to be an abandoned child.

(3b) In addition to the definition of abandonment in (3a) above, an abandoned child, for purposes of this chapter, shall be a child under eighteen years of age who has been placed in the care of a child caring institution or foster home, and whose parent, parents, or guardian of the person has failed substantially and continuously for a period of more than one year to maintain contact with such child, and has willfully failed for such period to contribute adequate support to such child, although physically and financially able to do so. In order to find an abandonment under this subdivision, the court must find the foregoing and the court must also find that diligent but unsuccessful efforts have been made on the part of the institution or a child placing agency to encourage the parent, parents, or guardian of the person of the child to strengthen the parental or custodial relationship to the child.

(4) "Readoption" means an adoption by any person of a child who has been previously legally adopted.

(5) "Stepchild" means the child of one spouse by a former union, whether or not such child was born in wedlock. (1949, c. 300; 1953, c. 880; 1957, c. 778, s. 1; 1961, c. 241.)

Editor's Note.—This section is set out above to correct an error appearing in the replacement volume.

§ 48-3. What minor children may be adopted.

Editor's Note.—Session Laws 1967, c. 880, s. 2, effective July 1, 1967, changed the catchline of this section from "Who may be adopted" to "What minor children may be adopted."

§ **48-4. Who may adopt children.** — (a) Any person over twenty-one years of age may petition in a special proceeding in the superior court to adopt a minor child and may also petition for a change of the name of such child. If the petitioner has a husband or wife living, competent to join in the petition, such spouse shall join in the petition.

(b) Provided, however, that if the spouse of the petitioner is a natural parent of the child to be adopted, such spouse need not join in the petition but need only to give consent as provided in G.S. § 48-7 (d).

(c) Provided further, that the petitioner or petitioners shall have resided in North Carolina, or on federal territory within the boundaries of North Carolina, for six months next preceding the filing of the petition unless the petition is for the adoption of a stepchild as provided in subsection (b) or for the adoption of a child who is by blood the grandchild of one of the petitioners, or unless, in the case of a child born out of wedlock, the petitioners file an affidavit with the court as described in subsection (d). In cases where the petition is for the adoption of a child who is by blood the grandchild of one of the petitioners and in the case of a child born out of wedlock and where the petitioners file an affidavit with the court as described in subsection (d) and in cases where the petition is for the adoption of a stepchild, the petitioner must be in fact residing in North Carolina, or on a federal territory within the boundaries of North Carolina, at the time the petition is filed. The provisions of this subsection concerning the adoption of a grandchild shall apply in the case of any petition filed on or after January 1, 1967.

(d) In the case of a child born out of wedlock, if the putative father of the child or the putative father and his spouse are petitioners seeking to adopt the child, and the petitioners shall state in an affidavit filed with the court that the male petitioner is the father of the child or that he is believed by the petitioners to be

the father of the child, and that the child was born out of wedlock, and the petitioners must be in fact residing in North Carolina, or on a federal territory within the boundaries of North Carolina, at the time the petition is filed. (1949, c. 300; 1963, c. 699; 1967, c. 619, ss. 1-3; c. 693.)

Editor's Note.—

The first 1967 amendment, effective July 1, 1967, inserted in subsection (c) the provisions as to adoption of a grandchild and a child born out of wedlock and added subsection (d).

The second 1967 amendment, effective July 1, 1967, substituted "six months" for "one year" in subsection (c).

§ 48-5. Parents, etc., not necessary parties to adoption proceedings upon finding of abandonment.

Opinions of Attorney General. — Mr. Louis O'Conner, Jr., Director, Welfare Programs Division, State Department of Social Services, 9/30/69.

§ 48-6. When consent of father not necessary.—(a) In the case of a child born out of wedlock and when said child has not been legitimated prior to the time of the signing of the consent, the written consent of the mother alone shall be sufficient under this chapter and the father need not be made a party to the proceeding. The legitimation of the child by any means subsequent to the signing of such consent of the mother shall not make such consent invalid nor adversely affect the sufficiency of such consent nor make necessary the consent of the father or his joinder as a party to the proceeding.

(1969, c. 534, s. 1.)

Editor's Note.—The 1969 amendment added the second sentence of subsection (a). Section 4 of the amendatory act provides: "This act is intended to clarify and express in part the original, as well as the present, purpose and intent of § 48-6 (a) of the General Statutes of North Carolina as related to chapter 49, article 2."

As subsection (b) was not changed by the amendment, it is not set out.

§ 48-6.1. When consent of mother of illegitimate child not necessary.—Whenever it has been judicially determined in a proceeding instituted pursuant to the provisions of North Carolina G.S. 130-58.1 that a child born out of wedlock is living under such conditions that the health or general welfare of such child is endangered by its living conditions and environment, then, the consent of the mother to the adoption of such child shall not be necessary as a prerequisite to the validity of the adoption of said child. (1963, c. 1258; 1969, c. 911, s. 8.)

Editor's Note. — The 1969 amendment substituted "G.S. 130-58.1" for "G.S. 110-25.1."

Session Laws 1969, c. 911, s. 11, provides: "This act shall be effective January 1, 1970, provided that in those districts where the district court is not yet established, the courts exercising juvenile jurisdiction on the effective date shall continue to exercise juvenile jurisdiction until the district court is established."

§ 48-7. When consent of parents or guardian necessary.—(a) Except as provided in G.S. 48-5, G.S. 48-6 or G.S. 7A-288, and if they are living and have not released all rights to the child and consented generally to adoption as provided in G.S. § 48-9, the parents or surviving parent or guardian of the person of the child must be a party or parties of record to the proceeding and must give written consent to adoption, which must be filed with the petition.

(1969, c. 911, s. 6.)

Editor's Note.—

The 1969 amendment inserted the reference to § 7A-288 near the beginning of subsection (a).

Session Laws 1969, c. 911, s. 11, provides: "This act act shall be effective January 1, 1970, provided that in those districts where the district court is not yet established, the courts exercising juvenile jurisdiction on the effective date shall continue to exercise juvenile jurisdiction until the district court is established."

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 48-9. When consent may be given by persons other than parents. —(a) In the following instances written consent sufficient for the purposes of adoption filed with the petition shall be sufficient to make the person giving consent a party to the proceeding and no service of any process need be made upon such person.

(1) When the parent, parents, or guardian of the person of the child, has in writing surrendered the child to a director of public welfare of a county or to a licensed child-placing agency and at the same time in writing has consented generally to adoption of the child, the director of public welfare or the executive head of such agency may give consent to the adoption of the child by the petitioners. A county director of public welfare may accept the surrender of a child who was born in the county or whose parent or parents have established residence in the county.

(2) If the court finds as a fact that there is no person qualified to give consent, or that the child has been abandoned by one or both parents or by the guardian of the person of the child, the court shall appoint some suitable person or the county director of public welfare of the county in which the child resides to act in the proceeding as next friend of the child to give or withhold such consent. The court may make the appointment immediately upon such determination and forthwith may make such further orders as to the court may seem proper.

(3) When a district court has entered an order terminating parental rights as provided by G.S. 7A-288, and when the court has placed such child in the custody of the county department of social services or a licensed child-placing agency, then the director of such county department of social services or the executive director of such licensed child-placing agency shall have the right to give written consent to the adoption of such child without being appointed as next friend of the child.

(1969, c. 911, s. 7.)

Editor's Note. — The 1969 amendment added subdivision (3) of subsection (a).

Session Laws 1969, c. 911, s. 11, provides: "This act shall be effective January 1, 1970, provided that in those districts where the district court is not yet established, the courts exercising juvenile jurisdiction on the effective date shall continue to exercise juvenile jurisdiction until the district court is established."

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 48-9.1. Additional effects of surrender and consent given to director of public welfare or to licensed child-placing agency; custody of child; disposition of certain unadoptable children. — The legal effects of written surrender and general consent to adoption given to and accepted by a director of public welfare or a licensed child-placing agency in accordance with G.S. 48-9 (a) (1) shall be as follows:

(1) The county department of public welfare which the director represents, or the child-placing agency, to whom surrender and consent has been given, shall have legal custody of the child and the rights of the consenting parties, except inheritance rights, until entry of the interlocutory decree provided for in G.S. 48-17, or until the final order of adoption is entered if the interlocutory decree is waived by the court in accordance with G.S. 48-21, or until consent is revoked within the time permitted by law, or unless otherwise ordered by a court of competent jurisdiction. A county department of public welfare having custody of the child shall pay the costs of the care of the child prior to placement for adoption.

(2) Upon receipt of written notice from a county department of public wel-

fare or duly licensed adoption agency which has accepted surrender, release and consent to adoption, that a child is unadoptable for physical, mental, or other causes, the county department of public welfare of the child's legal settlement at the time of the child's birth shall assume custody and full responsibility for the care of the child and shall acknowledge acceptance of custody and responsibility in writing to the notifying agency. Certified copies of the notice and acceptance shall be filed by the county department of public welfare with the State Department of Public Welfare. Such transfer of custody of the child shall be accompanied by the surrender, release and consent and the county department of public welfare shall thereafter have the same authority to place the child and give consent for his adoption as given to the original agency. In the event of controversy as to the county of the child's legal settlement at the time of his birth, any court assuming jurisdiction over the controversy shall determine which county department of public welfare shall be responsible for the care and custody of the child in accordance with the provisions of G.S. 7A-286 (2) c. The county of the child's settlement at the time of his birth shall be deemed the county of residence of the child for the purpose of making appropriate disposition of the child under G.S. 7A-286 (2) c. If the court shall award custody of the child to a county department of public welfare, the court shall order the child-placing agency to deliver the surrender and consent in its possession to the county department of public welfare to which custody of the child has been given. The county department of public welfare, upon receiving custody of the child and the surrender and consent, shall have authority to give consent to the adoption of the child as in the case of surrender and consent given initially to a director of public welfare. The agency or director of public welfare having the surrender, release and consent and the custody of the child may make mutually voluntary placement of the child with one or more of those who surrendered the child, as to the agency or director may seem in the best interest of the child and the parties to the surrender, provided the placement is approved by a court of competent jurisdiction. (1967, c. 926, s. 1; 1969, c. 911, s. 9.)

Editor's Note.—Section 3, c. 926, Session Laws 1967, provides that the act shall be effective on and after July 1, 1967.

The 1969 amendment substituted "G.S. 7A-286 (2) c" for "G.S. 110-29 (3)" in two places in subdivision (2).

Session Laws 1969, c. 911, s. 11, provides: "This act shall be effective January 1, 1970, provided that in those districts where the district court is not yet established, the courts exercising juvenile jurisdiction on the effective date shall continue to exercise juvenile jurisdiction until the district court is established."

§ 48-21. Final order of adoption; termination of proceeding within three years.

(c) Upon examination of the written report required under G.S. 48-16, the court may, in its discretion, waive the entering of the interlocutory decree and the probationary period and grant a final order of adoption when one of the petitioners is the putative father of the child and the petitioners file with the court the affidavit described in G.S. 48-4 (d) or when the child is by blood a grandchild, great grandchild, nephew or niece, grandnephew or grandniece, brother or sister, half brother or half sister, of one of the petitioners or is the stepchild of the petitioner, or where the child is at least twelve years of age and has resided in the home of the petitioners for five years prior to the filing of the petition and consents to the adoption as provided in G.S. 48-10.

(1967, c. 19; c. 619, s. 4.)

Editor's Note.—The first 1967 amendment inserted, in subsection (c), "brother or sister, half brother or half sister." The amendment also substituted "twelve" for

"sixteen" in the provision in subsection (c) as to adoption of a child who has resided in the home of the petitioners for five years and consents to the adoption.

The second 1967 amendment, effective July 1, 1967, inserted in subsection (c) "when one of the petitioners is the putative father of the child and the petitioners file with the court the affidavit described in G.S. 48-4(d) or."

As the rest of the section was not changed by the amendments, only subsection (c) is set out.

§ 48-23. Legal effect of final order.

(2) The natural parents of the person adopted, if living, shall, from and after the entry of the final order of adoption, be relieved of all legal duties and obligations due from them to the person adopted, and shall be divested of all rights with respect to such person. This section shall not affect the duties, obligations, and rights of a putative father who has adopted his own child.

(1967, c. 619, s. 5.)

Editor's Note.—

The 1967 amendment, effective July 1, 1967, added the second sentence of subdivision (2).

As the rest of the section was not changed by the amendment, only subdivision (2) is set out.

Cited in De Lotbiniere v. Wachovia Bank & Trust Co., 2 N.C. App. 252, 163 S.E.2d 59 (1968).

§ 48-24. Recordation of adoption proceedings.—(a) Only the final order of adoption or the final order dismissing the proceeding, and no other papers relating to the proceeding, shall be recorded in the office of the clerk of the superior court in the county in which the adoption takes place.

(b) A copy of the petition, any affidavit filed in accordance with G.S. 48-4 (d), the consent, the report on the condition and antecedents of the child and the suitability of the foster home, a copy of the interlocutory decree, the report on the placement, and a copy of the final order must be sent by the clerk of the superior court to the State Board of Public Welfare in the following order:

(1) Within ten days after the petition is filed with the clerk of the superior court, a copy of the petition giving the date of the filing of the original petition, any affidavit filed in accordance with G.S. 48-4 (d), and the consent must be filed by the clerk with the State Board of Public Welfare.

(2) Within ten days after an interlocutory decree is entered, a copy of the interlocutory decree giving the date of the issuance of the decree and the report to the court on the condition and antecedents of the child and the suitability of the foster home must be filed by the clerk with the State Board of Public Welfare. When the interlocutory decree is waived, as provided in G.S. § 48-21 the said report and the recommendation to waive the interlocutory decree shall be so filed by the clerk.

(3) Within ten days after the final order of adoption is made the clerk must file with the State Board of Public Welfare the report on the supervision of the placement during the interlocutory period, and a copy of the final order.

(c) The said Board must cause all papers and reports related to the proceeding to be permanently indexed and filed. (1949, c. 300; 1967, c. 619, ss. 6, 7.)

Editor's Note.—The 1967 amendment, effective July 1, 1967, inserted "any affidavit filed in accordance with G.S. 48-4 (d)" in the opening paragraph of subsection (b) and in subdivision (1) of subsection (b).

§ 48-29. Change of name; report to State Registrar; new birth certificate to be made.—(a) For proper cause the court may decree that the name of the child shall be changed to such name as may be prayed in the adoption petition or in a petition subsequently filed with the court by the adoptive parents, but in the case of any child who has reached the age of twenty-one (21) years,

the child's written consent to the change of name also must be filed with the clerk. When the name of any child is so changed, the court shall forthwith report such change to the Office of Vital Statistics of the State Board of Health. Upon receipt of the report, the State Registrar of the Office of Vital Statistics shall prepare a new birth certificate for the child named in the report which shall contain the following information: Full adoptive name of child, sex, date of birth, race of adoptive parents, full name of adoptive father, full maiden name of adoptive mother, and such other pertinent information not inconsistent herewith as may be determined by the State Registrar. The city and county of residence of the adoptive parents at the time the petition is filed shall be shown as the place of birth, and the names of the attending physician and the local registrar shall be omitted: Provided, that when the adoptive parents reside in another state at the time the petition is filed the city and county of birth of the child shall be the same on the new birth certificate as on the original certificate, except as otherwise provided in subsection (d). No reference shall be made on the new certificate to the adoption of the child, nor shall the adopting parents be referred to as foster parents.

(d) This section shall apply in the case of a child born outside the State if the adoptive parents procure and furnish to the State Registrar a certified copy of the final order of adoption to be forwarded by the State Registrar to the appropriate vital statistics agency in the state of the child's birth, and further, if the adoptive parents procure and furnish to the State Registrar a birth certificate issued for the child by a duly authorized agency or representative of the state in which the child was born. The certificate so issued shall constitute the original certificate referred to in subsections (a) and (b). If the adoptive parents of a child born outside the State reside in another state at the time the petition is filed, the city and county of the court issuing the final order of adoption shall be shown on the new certificate as the place of birth. (1949, c. 300; 1951, c. 730, ss. 1-4; 1955, c. 951, s.

(e) The foregoing provisions to the contrary notwithstanding, the place of birth of any child adopted by a spouse of a natural parent of that child shall be the same on the new birth certificate as on the original certificate when the adoptive parent so requests. (1949, c. 300; 1951, c. 730, ss. 1-4; 1955, c. 951, s. 1; 1967, c. 1042, ss. 1-3; 1969, c. 21, s. 2; c. 977.)

Editor's Note. — The 1967 amendment deleted "shown" following "cause" near the beginning of the first sentence in subsection (a), inserted "adoption" preceding the first "petition" in that sentence, added "or in a petition subsequently filed with the court by the adoptive parents" near the middle of such sentence, added "except as otherwise provided in subsection (d)" at the end of the fourth sentence in subsection (a) and added subsection (d).

As the rest of the section was not affected by the amendments, it is not set out.

Section 3½ of c. 1042, Session Laws 1967, provides that sections 2 and 3 of the act (adding the exception at the end of the fourth sentence in subsection (a) and adding subsection (d), respectively) "shall apply only to the birth certificate of the child whose adoption is recorded under North Carolina Index Number 16429 in the files of the State Department of Public Welfare."

The first 1969 amendment, effective July 1, 1969, added at the end of the first sentence in subsection (a) the provisions as to a child who has reached the age of 21.

Session Laws 1969, c. 21, s. 1, effective July 1, 1969, provides that the act shall be known as the Adopted Persons' Change of Name Act of 1969.

The second 1969 amendment added subsection (e).

§ 48-30. Guardian appointed when custody granted of child with estate.

Opinions of Attorney General. — Mr. Louis O'Conner, Jr., Director, Welfare Programs Division, State Department of Social Services, 9/18/69.

§ 48-36. Adoption of persons who are twenty-one or more years of age; change of name; clerk's certificate and record; notation on birth certificate; new birth certificate.—(a) Any person who is 21 or more years of age, or any two such persons who are lawfully married to each other, may peti-

tion the clerk of superior court that such person or persons be declared the adoptive parents of any other person who is 21 or more years of age who shall file with the clerk written consent to such adoption. The petitioners and the person to be adopted must have resided in North Carolina or on a federal territory therein for six months immediately preceding the filing of the petition. The petition and consent must be filed in the county where the person to be adopted resides. The clerk shall not enter any order granting the petition until it has been made to appear to him that one copy each of the petition and the consent have been posted at the courthouse door continuously for 10 days immediately preceding such order. For good cause shown, the clerk may issue an order declaring the petitioners to be the adoptive parents of the person consenting to be adopted.

(b) Upon entry of the order of adoption in accordance with the provisions of subsection (a) of this section, the rights, duties, and obligations of the adoptive parents and the person adopted shall be, in relation to each other, and in relation to all other persons, the same as if the adoption had been completed under the provisions of this chapter other than those contained in this section, and as if the adoption had taken place immediately before the person adopted became 21 years of age; provided, however, the provisions of this section shall not relieve any person of any duty to support any other person, nor shall the provisions of this section relieve any person of any criminal liability, arising under any other provision of law, for failure to provide support for any person.

(c) Except as provided in subsections (b), (d) and (e) of this section, the provisions of this chapter which are not a part of this section shall not apply to the adoption of persons who are more than 21 years of age.

(d) Except in the case of a change of name in accordance with subsection (e) of this section, at the time of or subsequent to the entry of the order of adoption, the clerk may for proper cause shown and upon written application of the adoptive parents and the person adopted, issue an order changing the name of the person adopted from his true name to the name applied for. The order shall contain the true name, the county of birth, the date of birth, the full name of the person to be adopted, his county of birth, his date of birth, the full name of his parents as shown on his birth certificate, and the name sought to be adopted. The clerk shall issue to the person adopted a certificate under his hand and seal of office, stating the change made in the name, and shall record the applications and order on the docket of special proceedings in his court. He shall forward a copy of the change of name order to the State Registrar of Vital Statistics if the person adopted was born in North Carolina. Upon receipt of the order, the State Registrar shall note the change of name specified in the order on the birth certificate of the person adopted, and shall notify the register of deeds of the county of birth of the person adopted.

(e) If requested in the application for the change of name filed by the adoptive parents and the person adopted the clerk may, for good cause shown, before or after the entry of the order of adoption, decree a change of name in accordance with and subject to all the provisions of G.S. 48-29 except G.S. 48-29 (d) relating to children born outside the State. (1967, c. 880, s. 3; 1969, c. 21, ss. 3-6.)

Editor's Note.—Section 5, c. 880, Session Laws 1967, provides that the act shall be effective on and after July 1, 1967.

The 1969 amendment, effective July 1, 1969, inserted "(d) and (e)" near the beginning of subsection (c) and added subsections (d) and (e).

Session Laws 1969, c. 21, s. 1, effective July 1, 1969, provides that the act shall be known as the Adopted Persons' Change of Name Act of 1969.

Chapter 49.

Bastardy.

Article 1.

Support of Illegitimate Children.

§ 49-1. Title.

Editor's Note.—

For note on illegitimacy in North Carolina, see 46 N.C.L. Rev. 813 (1968).

§ 49-2. Nonsupport of illegitimate child by parents made misdemeanor.

Elements.—For a defendant to be found guilty of the criminal offense created by this section, two facts must be established: First, that the defendant is a parent of the illegitimate child in question, who must be a person coming within the definition of a child as set forth in this section; and second, that the defendant has willfully neglected or refused to support and maintain such illegitimate child. In addition, if the defendant is the reputed father, it must be shown that the prosecution has been instituted within one of the time periods provided in § 49-4. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

Violation of Statute, etc.—

The offense of nonsupport under this section is a continuing one. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

A new warrant may be filed charging defendant with nonsupport, if such has occurred after the issuance of the warrant on which he has been tried. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

The begetting of, etc.—

Under this section the mere begetting of the child is not a crime. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

Prosecution Is Grounded, etc.—

The crime recognized by this section is the willful neglect or refusal of a parent to support his or her illegitimate child. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

The question of paternity, etc.—

The question of paternity is incidental to the prosecution for the crime of nonsupport—a preliminary requisite to conviction. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

State Must Prove, etc.—

In a prosecution under this section the burden is upon the State upon defendant's plea of not guilty to prove not only that defendant is the father of the child and had refused or neglected to support the child, but further that his refusal or neglect was willful. State v. Mason, 268 N.C. 423, 150 S.E.2d 753 (1966).

Instruction as to Willfulness.—

In a prosecution under this section an instruction that the jury should find defendant guilty if it found from the evidence beyond a reasonable doubt that defendant was the father of the child, without submitting the question of whether defendant willfully refused to support the child, must be held for prejudicial error. State v. Mason, 268 N.C. 423, 150 S.E.2d 753 (1966).

Submission of Interrogatories or Issues Is Approved.—The submission of interrogatories or issues in criminal prosecutions under this section is now the approved practice, the questions and answers being treated as a special verdict. State v. McKee, 269 N.C. 280, 152 S.E.2d 204 (1967).

Applied in State v. Cooke, 268 N.C. 201, 150 S.E.2d 226 (1966).

Cited in In re Custody of Owenby, 3 N.C. App. 53, 164 S.E.2d 55 (1968).

§ 49-4. When prosecution may be commenced.

Proof Required under Subdivision (3).— Where the prosecution was not begun within three years next after the birth, neither was paternity judicially determined within that time, the State must meet the requirements of subdivision (3) of this section and prove not only that defendant made payments for the child's support within the three years next after its birth but also that the warrant was issued within three years from the date of the last payment. State v. McKee, 269 N.C. 280, 152 S.E.2d 204 (1967).

Cited in State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

§ 49-7. Jurisdiction of inferior courts; issues and orders.

The proviso in this section was not repealed either expressly or by implication by enactment of § 7A-288. The two statutes, when properly construed together, are not inconsistent. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

§ 49-8. Power of court to modify orders; suspend sentence, etc.

Local Modification. — Person: 1967, c. 848, s. 1.

ARTICLE 2.

Legitimation of Illegitimate Children.

§ 49-13.1. Effect of legitimation on adoption consent.—Legitimation of a child under the provisions of this article shall not invalidate or adversely affect the sufficiency of the consent to adoption given by the mother alone, nor make necessary the consent of the father or his joinder as a party to the adoption proceeding, when the provisions of G.S. 48-6 (a) and amendments thereto are applicable. (1969, c. 534, s. 2.)

Editor's Note.—Session Laws 1969, c. 534, s. 4, provides: "This act is intended to clarify and express in part the original, as well as the present, purpose and intent of § 48-6 (a) of the General Statutes of North Carolina as related to chapter 49, article 2."

ARTICLE 3.

Civil Actions Regarding Illegitimate Children.

§ 49-14. Civil action to establish paternity.—(a) The paternity of a child born out of wedlock may be established by civil action. Such establishment of paternity shall not have the effect of legitimation.

(b) Proof of paternity pursuant to this section shall be beyond a reasonable doubt.

(c) Such action for paternity may be commenced within one of the following periods:

(1) Three years next after the birth of the child; or

(2) Where the reputed father has acknowledged paternity of the child by payments for the support thereof within three years next after the birth of such child, three years from the date of the last payment whether such last payment was made within three years of the birth of such child or thereafter, but such action must be commenced before the child attains the age of 18 years. (1967, c. 993, s. 1.)

Editor's Note.—Section 4, c. 993, Session Laws 1967, provides that the act shall become effective Oct. 1, 1967.

§ 49-15. Custody and support of illegitimate children when paternity established.—Upon and after the establishment of paternity of an illegitimate child pursuant to G.S. 49-14, the rights, duties, and obligations of the mother and the father so established, with regard to support and custody of the child, shall be the same, and may be determined and enforced in the same manner, as if the child

were the legitimate child of such father and mother. When paternity has been established, the father becomes responsible for medical expenses incident to the pregnancy and the birth of the child. (1967, c. 993, s. 1.)

§ 49-16. Parties to proceeding.—Proceedings under this article may be brought by:

(1) The mother, the father, the child, or the personal representative of any of them, or

(2) When the child, or the mother in case of medical expenses, is likely to become a public charge, the director of public welfare or such person as by law performs the duties of such official,

a. In the county where the mother resides or is found,

b. In the county where the putative father resides or is found, or

c. In the county where the child resides or is found. (1967, c. 993, s. 1.)

Chapter 50.

Divorce and Alimony.

§ 50-1. Jurisdiction.

Applied in Thrasher v. Thrasher, 4 N.C. App. 534, 167 S.E.2d 549 (1969).

§ 50-5. Grounds for absolute divorce.

(5) If either party has engaged in an unnatural or abnormal sex act with a person of the same sex or of a different sex or with a beast.

(1967, c. 1152, s. 8.)

Editor's Note. — The 1967 amendment, effective Oct. 1, 1967, rewrote subdivision (5). Section 9 of the amendatory act provides that the act shall not apply to pending litigation.

Only Part of Section Set Out.—As only subdivision (5) was affected by the amendment, the rest of the section is not set out.

(6)

This section is not ambiguous. Vaughan v. Vaughan, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

"Confined." — By the use of the word "confined" in subdivision (6), the legislature did not contemplate such confinement as would require an inmate to be at all times under lock and key. Vaughan v.

Vaughan, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

The words "next preceding" in subdivision (6) have been held to mean the time nearest to the bringing of the action. Vaughan v. Vaughan, 4 N.C. App. 256, 166 S.E.2d 530 (1969).

It is not sufficient under subdivision (6) of this section that the insane spouse was confined to an institution for five consecutive years at some time prior to the commencement of the action, the statute requiring that confinement must be for five consecutive years "next preceding" the bringing of the action, which means the time nearest the bringing of the action. Vaughan v. Vaughan, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

Periods of probation are permissible under subdivision (6) as well as under § 122-67, and may be deemed not to have constituted an interruption of the confinement or a discharge from the hospital within the meaning of these statutes. Vaughan v. Vaughan, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

Releases from the State hospital on periods of probation did not defeat a party's right to a divorce under subdivision (6). Vaughan v. Vaughan, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

Defendant's discharge under § 122-67 terminated his confinement and he was, therefore, not confined for five years next preceding the institution of the action as required by subdivision (6). Vaughan v. Vaughan, 4 N.C. App. 253, 166 S.E.2d 530 (1969).

§ 50-6. Divorce after separation of one year on application of either party.

Separate Domicile for Wife. — North Carolina divorce statutes recognize the legality of a separate domicile, or residence, for the wife. Rector v. Rector, 4 N.C. App. 240, 166 S.E.2d 492 (1969).

To be valid a separation agreement must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Until deed of separation is rescinded, defendant cannot attack legality of separation or obtain alimony from plaintiff. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Plaintiff Need Not Establish, etc.—

In accord with original. See Overby v. Overby, 272 N.C. 636, 158 S.E.2d 799 (1968).

Grounds for Attacking Deed of Separation.—A married woman may attack the certificate of her acknowledgment and privy examination respecting her execution of a deed of separation, inter alia, upon the grounds of her mental incapacity, infancy, or the fraud of the grantee. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Burden of Establishing, etc.—

In accord with 4th paragraph in original. See Overby v. Overby, 272 N.C. 636, 158 S.E.2d 799 (1968).

Willful Abandonment, etc.—

In accord with 2nd paragraph in original. See O'Brien v. O'Brien, 266 N.C. 502, 146 S.E.2d 500 (1966).

Where the husband sues the wife under this section for an absolute divorce on the ground of one year's separation, she may defeat his action by alleging and proving that the separation was caused by his abandonment of her. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

The wife may defeat the husband's action for an absolute divorce under this section by showing as an affirmative defense that the separation of the parties has been occasioned by the act of the husband in wilfully abandoning her. McLeod v. McLeod, 1 N.C. App. 396, 161 S.E.2d 635 (1968).

If the husband alleges and establishes that he and his wife have lived separate and apart continuously for the required statutory period, one year or more next preceding the commencement of the action, her only defense is that the separation was caused by his act in willfully abandoning her. Overby v. Overby, 272 N.C. 636, 158 S.E.2d 799 (1968).

Abandonment requires that the separation or withdrawal be done wilfully and without just cause or provocation. Overby v. Overby, 272 N.C. 636, 158 S.E.2d 799 (1968).

Evidence insufficient to warrant submission of issue of wrongful abandonment as a defense in suit for divorce on ground of separation. Campbell v. Campbell, 270 N.C. 298, 154 S.E.2d 101 (1967).

Effect of Plaintiff's Misconduct, etc.—

From and after the execution of a valid deed of separation, a husband and wife living apart do so by mutual consent. The prior misconduct of one will not defeat his action for divorce under this section, brought two years (now one year) thereafter. Edmisten v. Edmisten, 265 N.C. 488, 144 S.E.2d 404 (1965).

§ 50-7. Grounds for divorce from bed and board.

It is not necessary for the plaintiff, etc.—

To obtain a divorce from bed and board the law requires that defendant establish only one of the grounds specified in this section. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

Cited in Richardson v. Richardson, 4 N.C. App. 99, 165 S.E.2d 678 (1969).

(1)

Abandonment under This Subdivision Not Synonymous, etc.—

Abandonment under this subdivision is not synonymous with the criminal offense defined in § 14-322. In a prosecution under § 14-322, the State must establish (1) a willful abandonment and (2) a willful failure to provide adequate support. Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966).

It is not necessary, etc.—

It is unnecessary for a husband to depart from his home and leave his wife in order to abandon her. By cruel treatment or failure to provide for her support, he may compel her to leave him. This would constitute abandonment by the husband. Somerset v. Somerset, 3 N.C. App. 473, 165 S.E.2d 33 (1969).

Withdrawal from Home Followed by Support.—A husband may be deemed to have abandoned his wife within the meaning of subdivision (1), and so be liable for alimony, notwithstanding the fact that, after cohabitation is brought to an end, he voluntarily provides her with adequate support. Whether his withdrawal from the home, followed by such support, constitutes an abandonment which is ground for suit by the wife for divorce from bed and board, and therefore ground for suit by her for alimony without divorce depends upon whether his withdrawal from the home was justified by the conduct of the wife. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

Willful Failure and Refusal to Provide Support. — Allegations that plaintiff was compelled to leave her husband because of his willful failure and refusal to provide her with support and that his failure was without provocation on her part are sufficient to state a cause of action for alimony without divorce on the ground of abandonment. Brady v. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968).

Continued and Persistent Cruelty or Neglect.—If a husband, by continued and persistent cruelty or neglect, forces his wife to leave his home, he may himself be guilty of abandonment. Somerset v. Somerset, 3 N.C. App. 473, 165 S.E.2d 33 (1969).

Defendant May Not Defeat, etc.—

In accord with original. See Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966).

Ending Cohabitation Is Desertion Whether or Not Support Is Paid.—A wife is entitled to her husband's society and the protection of his name and home in cohabitation. The permanent denial of these rights may be aggravated by leaving her destitute or mitigated by a liberal provision for her support, but if the cohabitation is brought to an end without justification and without the consent of the wife and without the intention of renewing it, the matrimonial offense of desertion is complete. Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966).

Fact That Husband Does, etc.—

In accord with original. See Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966).

(4)

Conduct of Defendant, etc.—

If a wife alleges cruel treatment or indignities, she not only must set out with particularity the acts which her husband has committed and upon which she relies, but also must allege, and consequently offer proof, that such acts were without adequate provocation on her part. Butler v. Butler, 1 N.C. App. 356, 161 S.E.2d 618 (1968).

(5) Becomes an excessive user of alcohol or drugs so as to render the condition of the other spouse intolerable and the life of that spouse burdensome. (1871-2, c. 193, s. 36; Code, s. 1286; Rev., s. 1562; C. S., s. 1660; 1967, c. 1152, s. 7.)

Editor's Note. — The 1967 amendment, effective Oct. 1, 1967, rewrote subdivision (5). Section 9 of the amendatory act provides that the act shall not apply to pending litigation.

Only Part of Section Set Out.—As only subdivision (5) was affected by the amendment, the rest of the section is not set out.

§ 50-8. Contents of complaint; verification.—In all actions for divorce the complaint shall be certified in accordance with the provisions of Rule 11 of the Rules of Civil Procedure and G.S. 1-148. The plaintiff shall set forth in his or her complaint that the complainant or defendant has been a resident of the State of North Carolina for at least six months next preceding the filing of the complaint, and that the facts set forth therein as grounds for divorce, except in actions for divorce from bed and board, have existed to his or her knowledge for at least six months prior to the filing of the complaint: Provided, however, that if the cause for divorce is one year separation, then it shall not be necessary to allege in the complaint that the grounds for divorce have existed for at least six months prior to the filing of the complaint; it being the purpose of this proviso to permit a divorce after such separation of one year without awaiting an additional six months for filing the complaint: Provided, further, that if the complainant is a nonresident of the State action shall be brought in the county of the defendant's residence, and summons served upon the defendant personally.

In all prior suits and actions for divorce heretofore instituted and tried in the courts of this State where the averments of fact required to be contained in the affidavit heretofore required by this section are or have been alleged and set forth in the complaint in said suits or actions and said complaints have been duly verified as required by Rule 11 of the Rules of Civil Procedure, said allegations so contained in said complaints shall be deemed to be, and are hereby made, a substantial compliance as to the allegations heretofore required by this section to be set forth in any affidavit; and all such suits or actions for divorce, as well as the judgments or decrees issued and entered as a result thereof, are hereby validated and declared to be legal and proper judgments and decrees of divorce.

In all suits and actions for divorce heretofore instituted and tried in this State on and subsequent to the 5th day of April, 1951, wherein the statements, averments, or allegations in the verification to the complaint in said suits or actions are not in accordance with the provisions of Rule 11 of the Rules of Civil Procedure and G.S. 1-148 or the requirements of this section as to verification of complaint or the allegations, statements or averments in the verification contain the language that the facts set forth in the complaint are true "to the best of affiant's knowledge and belief" instead of the language "that the same is true to his (or her) own knowledge" or similar variation in language, said allegations, statements and averments in said verifications as contained in or attached to said complaint shall be deemed to be, and are hereby made, a substantial compliance as to the allegations, averments or statements required by this section to be set forth in any such verifications; and all such suits or actions for divorce, as well as the judgments or decrees issued and entered as a result thereof, are hereby validated and declared to be legal and proper judgment and decrees of divorce. (1868-9, c. 93, s. 46; 1869-70, c. 184; Code, s. 1287; Rev., s. 1563; 1907, c. 1008, s. 1; C. S., s. 1661; 1925, c. 93; 1933, c. 71, ss. 2, 3; 1943, c. 448, s. 1; 1947, c. 165; 1949, c. 264, s. 4; 1951, c. 590; 1955, c. 103; 1965, c. 636, s. 3; c. 751, s. 1; 1967, c. 50; c. 954, s. 3.)

Editor's Note.—

Session Laws 1967, c. 50, inserted, in the portion of the second sentence preceding the first proviso, "except in actions for divorce from bed and board."

Session Laws 1967, c. 954, s. 3, effective July 1, 1969, substituted "Rule 11 of the Rules of Civil Procedure" for "G.S. 1-145" in the first, second and third paragraphs.

Session Laws 1969, c. 803, amends Session Laws 1967, c. 954, s. 10, so as to make the 1967 act effective Jan. 1, 1970. See Editor's note to § 1A-1.

The Rules of Civil Procedure are found in § 1A-1.

The common-law rule is that a woman, upon marriage, loses her own domicile and by operation of law acquires that of her husband; and that when the husband changes his domicile, hers follows and is drawn to his. Exceptions are made to the rule where a situation arises in which the interests of the spouses are not identical. Obviously, the interests of the spouses are not identical for the purposes of the dissolution of the marriage. This rule has been very generally applied in allowing the wife to acquire a separate domicile for the purpose of her maintaining an action for divorce or custody where there is no fault

on her part. In view of this rule, there is no logical, legal or equitable reason for allowing the wife, whose misconduct has brought about the separation, to insist upon the legal fiction that her domicile follows that of her husband, and thereby to defeat his action for divorce brought in the jurisdiction in which she actually resides. Rector v. Rector, 4 N.C. App. 240, 166 S.E.2d 492 (1969).

Separate Domicile for Wife. — North Carolina divorce statutes recognize the legality of a separate domicile, or residence, for the wife. Rector v. Rector, 4 N.C. App. 240, 166 S.E.2d 492 (1969).

A bona fide "residence," necessary under statutes in order to confer jurisdiction in divorce proceedings, is within the legal meaning of the word "domicile," that is, an abode animo manendi, a place where a person lives or has his home, to which, when absent, he intends to return, and from which he has no present purpose to depart. Rector v. Rector, 4 N.C. App. 240, 166 S.E.2d 492 (1969).

One need not be a citizen of the United States in order to establish residence or domicile within the State for purposes of divorce actions. Rector v. Rector, 4 N.C. App. 240, 166 S.E.2d 492 (1969).

Cited in Butler v. Butler, 1 N.C. App. 356, 161 S.E.2d 618 (1968).

§ 50-10. Material facts found by jury; parties cannot testify to adultery; waiver of jury trial in certain actions.

Editor's Note.—

For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965).

Purpose, etc.—

This legislation is based upon the gravest reasons of public policy and is designed, not only to prevent collusion where the same exists, but to remove the opportunity for it. Hicks v. Hicks, 4 N.C. App. 28, 165 S.E.2d 681 (1969).

Adultery as Explanation of Separation. —Where the wife sets up abandonment as a defense in the husband's action for divorce on the ground of two years' separation, the husband may testify as to the adultery of his wife in order to explain his separation from the wife and to establish his defense of recrimination, the husband's testimony being neither for nor against the wife on the issue of adultery, and therefore does not come within the purview of § 8-56 or this section. Hicks v. Hicks, 4 N.C. App. 28, 165 S.E.2d 681 (1969).

A party may waive the right to a jury trial in civil actions by failure to follow the statutory procedure to preserve such right. Laws v. Laws, 1 N.C. App. 243, 161 S.E.2d 40 (1968).

Judge Can Try Divorce on Grounds of Separation in Absence of Request for Jury. —In a suit for divorce on the grounds of separation, defendant having been personally served with summons, the judge, in the absence of a request for a jury trial filed prior to the call of the action for trial, has authority to hear the evidence, answer the issues, and render judgment thereon. This rule applies equally to contested and uncontested divorce actions. Langley v. Langley, 268 N.C. 415, 150 S.E.2d 764 (1966).

§ 50-11. Effects of absolute divorce.—(a) After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine except as hereinafter set out, and either party may marry again without restriction arising from the dissolved marriage.

(b) No judgment of divorce shall render illegitimate any child in esse, or begotten of the body of the wife during coverture.

(c) Except in case of divorce obtained with personal service on the defendant spouse, either within or without the State, upon the grounds of the adultery of the dependent spouse and except in case of divorce obtained by the dependent spouse in an action initiated by such spouse on the ground of separation for the statutory period a decree of absolute divorce shall not impair or destroy the right of a spouse to receive alimony and other rights provided for such spouse under any judgment or decree of a court rendered before or at the time of the rendering of the judgment for absolute divorce.

(d) A divorce obtained outside the State in an action in which jurisdiction over the person of the dependent spouse was not obtained shall not impair or destroy the right of the dependent spouse to alimony as provided by the laws of this

State. (1871-2, c. 193, s. 43; Code, s 1295; Rev., s. 1569; 1919, c. 204; C. S., s. 1663; 1953, c. 1313; 1955, c. 872, s. 1, 1967, c. 1152, s. 3.)

Editor's Note.—

The 1967 amendment, effective Oct 1, 1967, rewrote the section. Section 9 of the amendatory act provides that the act shall not apply to pending litigation.

Absolute Divorce Ends Power to Enter Alimony Order. — When a party has secured an absolute divorce, that puts it beyond the power of the court thereafter to enter an order for alimony. Mitchell v. Mitchell, 270 N.C. 253, 154 S.E.2d 71 (1967) (decided prior to the 1967 amendment).

Quoted in O'Brien v. O'Brien, 266 N.C. 502, 146 S.E.2d 500 (1966).

Cited in Becker v. Becker, 273 N.C. 65, 159 S.E.2d 569 (1968).

§ 50-11.1. Children born of voidable marriage legitimate.

Quoted in Rehm v. Rehm, 2 N.C. App. 298, 163 S.E.2d 54 (1968).

§ **50-13**: Repealed by Session Laws 1967, c. 1153, s. 1, effective October 1, 1967.

Cross References.—

As to action or proceeding for custody of minor child, see §§ 50-13.1 to 50-13.8.

§ **50-13.1. Action or proceeding for custody of minor child.**—Any parent, relative, or other person agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided. (1967, c. 1153, s. 2.)

Editor's Note. — Session Laws 1967, c. 1153, s. 2, adding §§ 50-13.1 to 50-13.8, is effective Oct. 1, 1967.

For case law survey as to custody, see 44 N.C.L. Rev. 1000 (1966).

Object of Legislature. — By the enactment of § 50-13.1 et seq., the legislature has sought to eliminate conflicting and inconsistent statutes which have caused pitfalls for litigants, and to bring all of the statutes relating to child custody and support together into one act. In re Holt, 1 N.C. App. 108, 160 S.E.2d 90 (1968); In re King, 3 N.C. App. 466, 165 S.E.2d 60 (1969).

§ **50-13.2. Who entitled to custody; terms of custody; taking child out of State.**—(a) An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child.

(b) An order for custody of a minor child may grant exclusive custody of such child to one person, agency, organization or institution, or, if clearly in the best interest of the child, provide for custody in two or more of the same, at such times and for such periods as will in the opinion of the judge best promote the interest and welfare of the child.

(c) An order for custody of a minor child may provide for such child to be taken outside of the State, but if the order contemplates the return of the child to this State, the judge may require the person, agency, organization or institution having custody out of this State to give bond or other security conditioned upon the return of the child to this State in accordance with the order of the court. (1957, c. 545; 1967, c. 1153, s. 2.)

Cross Reference.—See note to § 50-13.1.

Editor's Note.—The cases in the following note were decided under former § 50-13, which dealt with custody and maintenance of children in actions for divorce.

Jurisdiction.—When a divorce action is instituted, the court acquires jurisdiction over the children born to the marriage and may hear and determine questions as to the custody and maintenance of the children, both before and after final decree of divorce. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

The welfare of the child is the paramount consideration. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966); Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

The children of the marriage become the wards of the court, and their welfare is the determining factor in custody proceed-

ings. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965).

The welfare of the child in controversies involving custody is the polar star by which the courts must be guided in awarding custody. Chriscoe v. Chriscoe, 268 N.C. 554, 151 S.E.2d 33 (1966).

The child's welfare is the paramount consideration, and a parent's love must yield to another if, after judicial investigation, it is found that the best interest of the child is subserved thereby. Greer v. Greer, 5 N.C. App. 160, 167 S.E.2d 782 (1969).

This section merely codified the rule which had been many times announced by the North Carolina Supreme Court to the effect that in custody cases the welfare of the child is the polar star by which the court's decision must ever be guided. Greer v. Greer, 5 N.C. App. 160, 167 S.E.2d 782 (1969).

The guiding principle to be used by the court in a custody hearing is the welfare of the children involved. While this guiding principle is clear, decision in particular cases is often difficult and necessarily a wide discretion is vested in the trial judge. He has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion. Greer v. Greer, 5 N.C. App. 160, 167 S.E.2d 782 (1969).

When parents separate and later are divorced, the children of the marriage become the wards of the court and their welfare is the determining factor in custody proceedings. Greer v. Greer, 5 N.C. App. 160, 167 S.E.2d 782 (1969).

This statutory directive merely codified the rule which had been many times announced by the North Carolina Supreme Court to the effect that in custody cases the welfare of the child is the polar star by which the court's decision must ever be guided. In re Custody of Pitts, 2 N.C. App. 211, 162 S.E.2d 524 (1968).

But Trial Court Has Wide Discretion.—While the welfare of a child is always to be treated as the paramount consideration, the courts recognize that wide discretionary power is necessarily vested in the trial courts in reaching decisions in particular cases. Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967).

The decision to award custody of a minor is vested in the discretion of the trial judge who has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion. In re Custody of Pitts, 2 N.C. App. 211, 162 S.E.2d 524 (1968).

Wishes of Child of Age of Discretion are Entitled to Weight.—The wishes of a child of sufficient age to exercise discretion in choosing a custodian are entitled to considerable weight when the contest is between the parents, but are not controlling. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

But Such Wishes Are Not Controlling.—When the child has reached the age of discretion the court may consider the preference or wishes of the child to live with a particular person. A child has attained an age of discretion when it is of an age and capacity to form an intelligent or rational view on the matter. The expressed wish of a child of discretion is, however, never controlling upon the court, since the court must yield in all cases to what it considers to be for the child's best interests, regardless of the child's personal preference. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

Nor Is Verdict in Divorce Action.—The verdict in a divorce action can be an important factor in the judge's consideration of an award of custody, but it is not legally controlling. It is merely one of the circumstances for him to consider, along with all other relevant factors. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

Or Separation Agreement.—Valid separation agreements, including consent judgments based on such agreements with respect to marital rights, are not final and binding as to custody of minor children. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

A judgment awarding custody is based upon the conditions found to exist at the time it is entered. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965).

Courts are generally reluctant to deny all visitation rights to the divorced parent of a child of tender age, but it is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare. Swicegood v. Swicegood, 270 N. C. 278, 154 S.E.2d 324 (1967).

Determining the custody of minor children is never the province of a jury; it is that of the judge of the court in which the proceeding is pending. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

The question of custody is one addressed to the trial court. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

Trial Court Must Make Findings of Fact.—It is error for the court granting a

decree of divorce to award the custody of a child without findings of fact from which it could be determined that the order was adequately supported by competent evidence and was for the best interest of the child. Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967).

An order awarding custody of a child to the father, without any findings of fact other than a recital that the court had previously awarded custody to the father in a proceeding under former § 17-39, was fatally defective and the case was remanded for a detailed findings of fact. Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967).

When the trial court fails to find facts so that the Supreme Court can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

Such Findings Are Conclusive If Supported by Evidence.—The findings of the trial court in regard to the custody of children are conclusive when supported by competent evidence. Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967).

When the court finds that both parties are fit and proper persons to have custody of the children involved and then finds that it is to the best interests of the children for the father to have custody of said children, such holding will be upheld when it is supported by competent evidence. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

The court's findings of fact as to the care and custody of children will not be disturbed when supported by competent evidence, even though the evidence be conflicting. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

§ 50-13.3. Enforcement of order for custody.—(a) The wilful disobedience of an order providing for the custody of a minor child shall be punishable as for contempt as provided by G.S. 5-8 and G.S. 5-9.

(b) Any court of this State having jurisdiction to make an award of custody of a minor child in an action or proceeding therefor, shall have the power of injunction in such action or proceeding as provided in article 37 of chapter 1 of the General Statutes and G.S. 1A-1, Rule 65. (1967, c. 1153, s. 2; 1969, c. 895, s. 16.)

Cross Reference.—See note to § 50-13.1.

Editor's Note. — The 1969 amendment added "and G.S. 1A-1, Rule 65" at the end of subsection (b).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

§ 50-13.4. Action for support of minor child.—(a) Any parent, or any person, agency, organization or institution having custody of a minor child, or bringing an action or proceeding for the custody of such child, or a minor child by his guardian may institute an action for the support of such child as hereinafter provided.

(b) In the absence of pleading and proof that circumstances of the case otherwise warrant, the father, the mother, or any person, agency, organization or institution standing in loco parentis shall be liable, in that order, for the support of a minor child. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. Upon proof of such circumstances the judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child, as may be appropriate in the particular case, and if appropriate the court may authorize the application of any separate estate of the child to his support.

(c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance,

having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case.

(d) Payments for the support of a minor child shall be ordered to be paid to the person having custody of the child or any other proper person, agency, organization or institution, or to the court, for the benefit of such child.

(e) Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property or any interest therein, or a security interest in real property, as the court may order. In every case in which payment for the support of a minor child is ordered and alimony or alimony pendente lite is also ordered, the order shall separately state and identify each allowance.

(f) Remedies for enforcement of support of minor children shall be available as herein provided.

(1) The court may require the person ordered to make payments for the support of a minor child to secure the same by means of a bond, mortgage or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the execution of an assignment of wages, salary or other income due or to become due.

(2) If the court requires the transfer of real or personal property or an interest therein as provided in subsection (e) as a part of an order for payment of support for a minor child, or for the securing thereof, the court may also enter an order which shall transfer title as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

(3) The remedy of arrest and bail, as provided in article 34 of chapter 1 of the General Statutes, shall be available in actions for child-support payments as in other cases.

(4) The remedies of attachment and garnishment, as provided in article 35 of chapter 1 of the General Statutes, shall be available in an action for child-support payments as in other cases, and for such purposes the child or person bringing an action for child support shall be deemed a creditor of the defendant.

(5) The remedy of injunction, as provided in article 37 of chapter 1 of the General Statutes and G.S. 1A-1, Rule 65, shall be available in actions for child support as in other cases.

(6) Receivers, as provided in article 38 of chapter 1 of the General Statutes, may be appointed in actions for child support as in other cases.

(7) A minor child or other person for whose benefit an order for the payment of child support has been entered shall be a creditor within the meaning of article 3 of chapter 39 of the General Statutes pertaining to fraudulent conveyances.

(8) A judgment for child support shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments.

(9) The wilful disobedience of an order for the payment of child support shall be punishable as for contempt as provided by G.S. 5-8 and G.S. 5-9.

(10) The remedies provided by chapter 1 of the General Statutes, article 28, Execution; article 29B, Execution Sales; and article 31, Supplemental Proceedings, shall be available for the enforcement of judgments for child support as in other cases, but amounts so payable shall not constitue a debt as to which property is exempt from execution as provided in article 32 of chapter 1 of the General Statutes.

(11) The specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available. (1967, c. 1153, s. 2; 1969, c. 895, s. 17.)

Local Modification. — Person: 1967, c. 848, s. 2.

Cross Reference.—See note to § 50-13.1.

Editor's Note. — The 1969 amendment substituted "G.S. 1A-1, Rule 70" for "G.S. 1-227" in subdivision (2) of subsection (f) and inserted "and G.S. 1A-1, Rule 65" in subdivision (5) of subsection (f).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

Separation Agreements Are Not Binding on Court.—Valid separation agreements, including consent judgments with respect to marital rights based on such agreements, are not final and binding as to the amount to be provided for the support and education of minor children. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966) (decided under former § 15-13).

But Separation Agreement Cannot Be Ignored.—Provisions of a valid separation agreement including a consent judgment based thereon, cannot be ignored or set aside by the court without the consent of the parties. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

§ 50-13.5. Procedure in actions for custody or support of minor children.—(a) Procedure.—The procedure in actions for custody and support of minor children shall be as in civil actions, except as herein provided. The procedure in habeas corpus proceedings for custody and support of minor children shall be as in other habeas corpus proceedings, except as herein provided. In this § 50-13.5 the words "custody and support" shall be deemed to include custody or support, or both.

(b) Type of Action.—An action brought under the provisions of this section may be maintained as follows:

(1) As a civil action.

(2) By writ of habeas corpus, and the parties may appeal from the final judgment therein as in civil actions.

(3) Joined with an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(4) As a cross action in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(5) By motion in the cause in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(6) Upon the court's own motion in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(7) In any of the foregoing the judge may issue an order requiring that the body of the minor child be brought before him.

(c) Jurisdiction in Actions or Proceedings for Child Support and Child Custody.—

(1) The jurisdiction of the courts of this State to enter orders providing for the support of a minor child shall be as in actions or proceedings for the payment of money or the transfer of property.

(2) The courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child when:

a. The minor child resides, has his domicile, or is physically present in this State, or

b. When the court has personal jurisdiction of the person, agency, organization, or institution having actual care, control, and custody of the minor child.

(3) The respective rights of persons, agencies, organizations, or institutions claiming the right to custody of a minor child may be adjudicated even though the minor child is not actually before the court.

(4) Jurisdiction acquired under subdivisions (2) and (3) hereof shall not be divested by a change in circumstances while the action or proceeding is pending.

(5) If at any time a court of this State having jurisdiction of an action or proceeding for the custody of a minor child finds as a fact that a court in another state has assumed jurisdiction to determine the matter, and that the best interests of the child and the parties would be served by having the matter disposed of in that jurisdiction, the court of this State may, in its discretion, refuse to exercise jurisdiction, and dismiss the action or proceeding or may retain jurisdiction and enter such orders from time to time as the interest of the child may require.

(6) If at any time a court of this State having jurisdiction of an action or proceeding for the custody of a minor child finds as a fact that it would not be in the best interests of the child, or that it would work substantial injustice, for the action or proceeding to be tried in a court of this State, and that jurisdiction to determine the matter has not been assumed by a court in another state, the judge, on motion of any party, may enter an order to stay further proceedings in the action in this State. A moving party under this subdivision must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial. The court may retain jurisdiction of the matter for such time and upon such terms as it provides in its order.

(d) Service of Process; Notice; Interlocutory Orders.—

(1) Service of process in civil actions or habeas corpus proceedings for the custody of minor children shall be as in other civil actions or habeas corpus proceedings. Motions for custody or support of a minor child in a pending action may be made on five days' notice to the other parties and compliance with G.S. 50-13.5 (e).

(2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.

(e) Notice to Additional Persons in Custody Actions and Proceedings; Intervention.—

(1) The parents of the minor child whose addresses are reasonably ascertainable; any person, agency, organization or institution having actual care, control, or custody of a minor child; and any person, agency, organization or institution required by court order to provide for the support of a minor child, either in whole or in part, not named as parties and served with process in an action or proceeding for the custody of such child, shall be given notice by the party raising the issue of custody.

(2) The notice herein required shall be in the manner provided by the rules of civil procedure for the service of notices in actions. Such notice shall advise the person to be notified of the name of the child, the names of the parties to the action or proceeding, the court in which the action or proceeding was instituted, and the date thereof.

(3) In the discretion of the court, failure of such service of notice shall not affect the validity of any order or judgment entered in such action or proceeding.

(4) Any person required to be given notice as herein provided may intervene in an action or proceeding for custody of a minor child by filing in apt time notice of appearance or other appropriate pleadings.

(f) Venue.—An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, except as hereinafter provided. If an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been previously instituted in this State, until there has been a final judgment in such case, any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause in such action. If an action or proceeding for the custody and support of a minor child has been instituted and an action for annulment or for divorce, either absolute or from bed and board, or for alimony without divorce is subsequently instituted in the same or another county, the court having jurisdiction of the prior action or proceeding may, in its discretion direct that the action or proceeding for custody and support of a minor child be consolidated with such subsequent action, and in the event consolidation is ordered, shall determine in which court such consolidated action or proceeding shall be heard.

(g) Custody and Support Irrespective of Parents' Rights Inter Partes.—Orders for custody and support of minor children may be entered when the matter is before the court as provided by this section, irrespective of the rights of the wife and the husband as between themselves in an action for annulment or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(h) Court Having Jurisdiction.—When a district court having jurisdiction of the matter shall have been established, actions or proceedings for custody and support of minor children shall be heard without a jury by the judge of such district court, and may be heard at any time. Until a district court having jurisdiction shall have been established, actions or proceedings for custody and support of minor children shall be heard by a resident judge of superior court, a judge regularly holding the superior courts of the district in which the action or proceeding is brought, any judge holding a session of superior court, either civil or criminal, in the district including the county in which the action or proceeding is brought or a special judge of superior court residing in the district. Such action or proceeding may be heard in or out of session. If a court other than the superior court has jurisdiction over such action or proceeding, such jurisdiction shall not be affected by this subsection 50-13.5 (h). (1858-9, c. 53, s. 2; 1871-2, c. 193, ss. 39, 46; Code, ss. 1292, 1296, 1570, 1662; Rev., ss. 1567, 1570, 1854; 1919, c. 24; C. S., ss. 1664, 1667, 2242, 1921, c. 123; 1923, c. 52; 1939, c. 115; 1941, c. 120; 1943, c. 194; 1949, c. 1010; 1951, c. 893, s. 3; 1953, cc. 813, 925; 1955, cc. 814, 1189; 1957, c. 545; 1965, c. 310, s. 2; 1967, c. 1153, s. 2.)

Cross Reference.—See note to § 50-13.1.

Editor's Note.—The cases in the following note were decided under former § 50-13, which dealt with custody and maintenance of children in actions for divorce, and former § 50-16, which dealt with custody and support of children in proceedings for alimony without divorce.

For note on voluntary nonsuit in custody action, see 44 N.C.L. Rev. 1138 (1966).

Function of Court in Custody Proceeding.—In a custody proceeding, it is not the function of the courts to punish or reward a parent by withholding or awarding custody of minor children; the function of the court in such a proceeding is to diligently seek to act for the best interests and welfare of the minor child. In re McCraw Children, 3 N.C. App. 390, 165 S.E.2d 1 (1969).

The custody and support issue may be determined in an independent action in another court after final judgment in a previously instituted action between the

parents, where custody and support has not been brought to issue or determined. In re Holt, 1 N.C. App. 108, 160 S.E.2d 90 (1968).

Justice to all parties is best served when one judge is able to see the controversy whole. This section so provides. In re King, 3 N.C. App. 466, 165 S.E.2d 60 (1969).

Distinction between Divorce Actions and Habeas Corpus Proceedings. — In divorce actions, the marital rights and obligations of both husband and wife, as well as the custody and support of the children of the marriage, are before the court in a single action. In a habeas corpus proceeding the judge has jurisdiction of only one facet of the marital dispute, the custody and support of the children. In re King, 3 N.C. App. 466, 165 S.E.2d 60 (1969).

Permitting Custody Orders in Alimony Actions Created Additional Method of Determining Issues as to Children.—The 1955 amendment to former § 50-16, which provided that custody orders were authorized "in the same manner as such orders are entered by the court in an action for divorce," bolstered the decision in Blankenship v. Blankenship, 256 N.C. 638, 124 S.E.2d 857 (1962), which held that that section created an additional method whereby all questions relating to custody and child support were brought into and determined in the suit for alimony without divorce, in one action. In the matter of Custody of Sauls, 270 N.C. 180, 154 S.E.2d 327 (1967).

Divorce Action Gives Court Jurisdiction of Custody.—In divorce actions, whether for the dissolution of the marriage or from bed and board, the court in which the action is brought acquires jurisdiction over the custody of the unemancipated children of the parties. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965).

When a divorce action is instituted, jurisdiction over the custody of the children born of the marriage vests exclusively in the court before whom the divorce action is pending and becomes a concomitant part of the court's jurisdiction in the divorce action. In the matter of Custody of Sauls, 270 N.C. 180, 154 S.E.2d 327 (1967).

And Prior Habeas Corpus Decree Does Not Oust such Jurisdiction.—A decree awarding the custody of a child in a habeas corpus proceeding does not oust the court of jurisdiction to hear and determine the custody of the child in a subsequent divorce proceeding. Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967).

But Custody Jurisdiction of Court Where Alimony Action Is Pending Is Not Lost. —The general rule that exclusive custody jurisdiction is vested in the divorce court is subject to an exception: A court before which an action for alimony without divorce is pending does not lose its custody jurisdiction to the court of another county in which an action for divorce has been subsequently filed. In the Matter of Custody of Sauls, 270 N.C. 180, 154 S.E.2d 327 (1967).

Jurisdiction of Divorce Court Continues after Divorce.—The jurisdiction of the court over the custody of unemancipated children of the parties in a divorce action continues even after divorce. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965).

Order Removing Habeas Corpus Proceeding to County of Subsequent Alimony Action Not Disturbed.—In a habeas corpus proceeding instituted by the father to determine the right to custody of his minor son, the order of the court removing the proceeding on motion to a county in which the mother, subsequent to the service of the writ but before the hearing, had instituted an action for alimony without divorce and for the custody of the child, will not be disturbed. In the matter of Macon, 267 N.C. 248, 147 S.E.2d 909 (1966).

Adultery.—The establishment of adultery does not eo instanti juris et de jure render the guilty party unfit to have custody of minor children. In re McCraw Children, 3 N.C. App. 390, 165 S.E.2d 1 (1969).

A finding of adultery is sufficient to support a conclusion that the guilty party is unfit to have custody. There are many findings which would be sufficient to support a conclusion of unfitness, but it does not follow that they would always impel such a conclusion. In re McCraw Children, 3 N.C. App. 390, 165 S.E.2d 1 (1969).

Evidence of adulterous conduct, like evidence of other conduct, is relevant upon an inquiry of fitness of a person for the purpose of awarding custody of minor children to him or to her. In re McCraw Children, 3 N.C. App. 390, 165 S.E.2d 1 (1969).

Decision on Custody Conclusive.—The trial judge is present where he can observe and hear the parties and their witnesses, and ordinarily his decision on custody will be upheld if supported by competent evidence. In re McCraw Children, 3 N.C. App. 390, 165 S.E.2d 1 (1969).

§ 50-13.6. Counsel fees in actions for custody and support of minor children.—In an action or proceeding for the custody or support, or both, of a minor child the court may in its discretion allow reasonable attorney's fees to a dependent spouse, as defined in G.S. 50-16.1, who has insufficient means to defray the expenses of the suit. (1967, c. 1153, s. 2.)

Cross Reference.—See note to § 50-13.1.

§ 50-13.7. Modification of order for child support or custody.—(a) An order of a court of this State for custody or support, or both, of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.

(b) When an order for custody or support, or both, of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and upon a showing of changed circumstances, enter a new order for support or custody which modifies or supersedes such order for custody or support. (1858-9, c. 53; 1868-9, c. 116, s. 36; 1871-2, c. 193, s. 46; Code, ss. 1296, 1570, 1661; Rev., ss. 1570, 1853; C. S., ss. 1664, 2241; 1929, c. 270, s. 1; 1939, c. 115; 1941, c. 120; 1943, c. 194; 1949, c. 1010; 1953, c. 813; 1957, c. 545; 1965, c. 310, s. 2; 1967, c. 1153, s. 2.)

Cross Reference.—See note to § 50-13.1.

Editor's Note.—The cases in the following note were decided under former § 17-39.1, which dealt with determining custody of children in habeas corpus proceedings, former § 50-13, which dealt with custody and maintenance of children in divorce proceedings, and former § 50-16, which dealt with custody and support of children in actions for alimony without divorce.

Ultimate Object.—The welfare of the child is the "polar star" in the matters of custody and maintenance, yet common sense and common justice dictate that the ultimate object in such matters is to secure support commensurate with the needs of the child and the ability of the father to meet the needs. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

The control and custody of minor children cannot be determined finally. Changed conditions will always justify inquiry by the courts in the interest and welfare of the children, and decrees may be entered as often as the facts justify. In re Herring, 268 N.C. 434, 150 S.E.2d 775 (1966).

Neither agreements nor adjudications for the custody or support of a minor child are ever final. McLeod v. McLeod, 266 N.C. 144, 146 S.E.2d 65 (1966).

As children develop their needs change; nevertheless, the needs must be supplied by the parent, whose ability to supply them may change. For these reasons orders in custody proceedings are not final. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965).

Decrees entered by North Carolina courts in child custody and support matters are impermanent in character and are res judicata of the issue only so long as the facts and circumstances remain the same as when the decree was rendered. The decree is subject to alteration upon a change of circumstances affecting the welfare of the child. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

Hence, Divorce Decree Custody Provision Is Subject to Modification.—The provision of a final decree of divorce awarding the custody of the minor children of the marriage is subject to modification for subsequent change of condition as often as the facts justify. In the Matter of Custody of Marlowe, 268 N.C. 197, 150 S.E.2d 204 (1966).

And Judgment in Custody Suit Is Not Final.—On a hearing in a custody suit the judgment is not intended to be a final determination of the rights of the parties touching the care and control of the child, but, on a change of conditions, properly established, the question may be further heard and determined. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965).

Because of the court's paramount regard for the welfare of children whose parents are separated, the court, for their benefit, and upon proper showing, may modify or change a custody award. Stanback v. Stanback, 266 N.C. 72, 145 S.E.2d 332 (1965).

Father's Duty.—In cases of child support, the father's duty does not end with the furnishing of bare necessities when he is able to offer more, nor should the court order an increase in payments absent evidence of changed conditions or the need of such increase. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

The wishes of a child of sufficient age to exercise discretion in choosing a custodian is entitled to considerable weight

when the contest is between parents, but is not controlling. Elmore v. Elmore, 4 N.C. App. 192, 166 S.E.2d 506 (1969).

A change in circumstances must be shown in order to modify an order relating to custody, support or alimony. Elmore v. Elmore, 4 N.C. App. 192, 166 S.E.2d 506 (1969).

Burden of Showing Changed Circumstances.—When plaintiff moved that the original order be vacated and either modified or eliminated, he assumed the burden of showing that circumstances had changed between the time of the order and the time of the hearing upon his motion. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

Valid Custody Order May Not Be Collaterally Modified.—A valid order awarding custody of the child of the marriage is conclusive upon the parties and may not be modified collaterally by a petition praying that the child's custody be awarded to petitioner during a certain period. Robbins v. Robbins, 266 N.C. 635, 146 S.E.2d 671 (1966).

When the parents were divorced outside this State, either parent may have the question of custody as between them determined in a special proceeding in the superior court. In the Matter of Custody of Sauls, 270 N.C. 180, 154 S.E.2d 327 (1967).

The full faith and credit clause of the federal Constitution does not preclude the courts of this State from modifying the provision of a foreign divorce decree awarding custody of the minor children of the marriage for change of condition subsequent to the entry of the decree, and a case will be remanded for determination by the trial court whether there had been change in the conditions and circumstances since the entry of the decree sufficient to require the modification of the decree in the best interest of the minors. In the Matter of Custody of Marlowe, 268 N.C. 197, 150 S.E.2d 204 (1966).

§ 50-13.8. Custody and support of person incapable of self-support upon reaching majority.—For the purposes of custody and support, the rights of a person who is mentally or physically incapable of self-support upon reaching his majority shall be the same as a minor child for so long as he remains mentally or physically incapable of self-support. (1967, c. 1153, s. 2.)

Cross Reference.—See note to § 50-13.1.

§§ 50-14, 50-15: Repealed by Session Laws 1967, c. 1152, s. 1, effective October 1, 1967.

§ 50-16: Repealed by Session Laws 1967, c. 1152, s. 1; c. 1153, s. 1, effective October 1, 1967.

Cross References.—
As to action or proceeding for custody of minor child, see §§ 50-13.1 to 50-13.8.

§ 50-16.1. Definitions. — As used in the statutes relating to alimony and alimony pendente lite unless the context otherwise requires, the term:

(1) "Alimony" means payment for the support and maintenance of a spouse, either in lump sum or on a continuing basis, ordered in an action for divorce, whether absolute or from bed and board, or an action for alimony without divorce.

(2) "Alimony pendente lite" means alimony ordered to be paid pending the final judgment of divorce in an action for divorce, whether absolute or from bed and board, or in an action for annulment, or on the merits in an action for alimony without divorce.

(3) "Dependent spouse" means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse.

(4) "Supporting spouse" means a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and

support. A husband is deemed to be the supporting spouse unless he is incapable of supporting his wife. (1967, c. 1152, s. 2.)

Editor's Note.—Session Laws 1967, c. 1152, s. 2, adding §§ 50-16.1 to 50-16.10, is effective Oct. 1, 1967. Section 9 of c. 1152 provides that the act shall not apply to pending litigation.

Allegations on Ground of Abandonment.—The plaintiff in an action for alimony without divorce on the ground of abandonment is not required to allege the acts and conduct relied upon as the basis of the action with that degree of particularity as is required when the cause of action is based on such indignities to the person as to render her condition intolerable and life burdensome. Richardson v. Richardson, 4 N.C. App. 99, 165 S.E.2d 678 (1969).

Where complaint otherwise contained sufficient allegations to support a cause of action for alimony without divorce on ground of abandonment, the fact that the complaint referred to the repealed § 50-16 rather than to this section is not fatal. Richardson v. Richardson, 4 N.C. App. 99, 165 S.E.2d 678 (1969).

Consent Judgment Valid and Enforceable.—In an action for alimony without divorce, a judgment, entered by consent of the parties, which orders defendant to make alimony payments to his wife, is valid and is enforceable against the husband by attachment for contempt, notwithstanding the absence of allegations or findings that the separation was caused by the misconduct of the husband. Whitesides v. Whitesides, 271 N.C. 560, 157 S.E.2d 82 (1967).

Assaults and Cruel Treatment.—A wife may establish a right to alimony by a showing that she was compelled to leave home in fear of her safety as a result of defendant's assaults and cruel treatment. Gaskins v. Gaskins, 273 N.C. 133, 159 S.E.2d 318 (1968).

Applied in In re McCraw Children, 3 N.C. App. 390, 165 S.E.2d 1 (1969).

§ 50-16.2. Grounds for alimony. — A dependent spouse is entitled to an order for alimony when:

(1) The supporting spouse has committed adultery.

(2) There has been an involuntary separation of the spouses in consequence of a criminal act committed by the supporting spouse prior to the proceeding in which alimony is sought, and the spouses have lived separate and apart for one year, and the plaintiff or defendant in the proceeding has resided in this State for six months.

(3) The supporting spouse has engaged in an unnatural or abnormal sex act with a person of the same sex or of a different sex or with a beast.

(4) The supporting spouse abandons the dependent spouse.

(5) The supporting spouse maliciously turns the dependent spouse out of doors.

(6) The supporting spouse by cruel or barbarous treatment endangers the life of the dependent spouse.

(7) The supporting spouse offers such indignities to the person of the dependent spouse as to render his or her condition intolerable and life burdensome.

(8) The supporting spouse is a spendthrift.

(9) The supporting spouse is an excessive user of alcohol or drugs so as to render the condition of the dependent spouse intolerable and the life of the dependent spouse burdensome.

(10) The supporting spouse wilfully fails to provide the dependent spouse with necessary subsistence according to his or her means and condition so as to render the condition of the dependent spouse intolerable and the life of the dependent spouse burdensome. (1871-2, c. 193, ss. 37, 39; Code, ss. 1290, 1292; Rev., ss. 1565, 1567; 1919, c. 24; C. S., ss. 1665, 1667; 1921, c. 123; 1923, c. 52; 1951, c. 893, s. 3; 1953, c. 925; 1955, cc. 814, 1189; 1967, c. 1152, s. 2.)

Cross Reference.—See note to § 50-16.1.

Providing Support Does Not Negative Abandonment.—The husband's willful failure to provide adequate support for his

wife may be evidence of his abandonment of her, but the mere fact that he provides adequate support for her does not in itself negative abandonment as used in subdivision (1) of § 50-7. Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966) (decided under former § 50-16).

A wife is entitled to her husband's society and the protection of his name and home in cohabitation. The permanent denial of these rights may be aggravated by leaving her destitute or mitigated by a liberal provision for her support, but if the cohabitation is brought to an end without justification and without the consent of the wife and without the intention of renewing it, the matrimonial offense of desertion is complete. Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966) (decided under former § 50-16).

A husband may be deemed to have abandoned his wife within the meaning of § 50-7 (1), and so be liable for alimony, notwithstanding the fact that, after cohabitation is brought to an end, he voluntarily provides her with adequate support. Whether his withdrawal from the home, followed by such support, constitutes an abandonment which is ground for suit by the wife for divorce from bed and board, and therefore ground for suit by her for alimony without divorce, depends upon whether his withdrawal from the home was justified by the conduct of the wife. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

If it is determined that the husband's withdrawal from the home was without justification, notwithstanding his voluntary payments for the wife's subsistence thereafter, the court may award permanent alimony to the wife. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

The issues raised by the pleadings must be passed upon by a jury before permanent alimony may be awarded. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

Cited in Richardson v. Richardson, 4 N.C. App. 99, 165 S.E.2d 678 (1969).

§ 50-16.3. Grounds for alimony pendente lite. — (a) A dependent spouse who is a party to an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce, shall be entitled to an order for alimony pendente lite when:

(1) It shall appear from all the evidence presented pursuant to G.S. 50-16.8 (f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made, and

(2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof.

(b) The determination of the amount and the payment of alimony pendente lite shall be in the same manner as alimony, except that the same shall be limited to the pendency of the suit in which the application is made. (1871-2, c. 193, ss. 38, 39; 1883, c. 67; Code, ss. 1291, 1292; Rev., ss. 1566, 1567; 1919, c. 24; C. S., ss. 1666, 1667; 1921, c. 123; 1923, c. 52; 1951, c. 893, s. 3; 1953, c. 925; 1955, cc. 814, 1189; 1961, c. 80; 1967, c. 1152, s. 2.)

Cross Reference.—See note to § 50-16.1.

Editor's Note.—The cases in the following note were decided under former §§ 50-15 and 50-16, which dealt with alimony pendente lite in actions for divorce and in actions for alimony without divorce, respectively.

Purpose of Remedy.—The remedy established for the subsistence of the wife pending the trial and final determination of the issues involved and for her counsel fees is intended to enable her to maintain herself according to her station in life and to have sufficient funds to employ adequate counsel to meet her husband at the trial upon substantially equal terms. Myers v. Myers, 270 N.C. 263, 154 S.E.2d 84 (1967).

The remedy of subsistence and counsel fees pendente lite is intended to enable the wife to maintain herself according to her station in life and to employ counsel to meet her husband at the trial upon substantially equal terms. Brady v. Brady, 273 N.C. 29, 160 S.E.2d 13 (1968).

The purpose of the award of support pendente lite is to provide for the reasonable and proper support of the wife in an emergency situation, pending the final determination of her rights. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

The granting of alimony pendente lite is given by statute for the very purpose that the wife have immediate support and be

able to maintain her action. It is a matter of urgency. Brady v. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968).

Allowance as a Legal Right.—Generally, excluding statutory grounds for denial allowance of support to an indigent wife while prosecuting a meritorious suit against her husband is so strongly entrenched in practice as to be considered an established legal right. Garner v. Garner, 270 N.C. 293, 154 S.E.2d 46 (1967).

No Allowance Where Plaintiff, in Law, Has No Case.—Discretion in allowance of support to a wife while suing her husband is confined to consideration of necessities of the wife on the one hand and the means of the husband on the other, but to warrant such allowance the court is expected to look into the merits of the action and would not be justified in allowing subsistence and counsel fees where the plaintiff, in law, has no case. Garner v. Garner, 270 N.C. 293, 154 S.E.2d 46 (1967).

Subsistence and counsel fees pendente lite are within the discretion of the court, and its decision is not reviewable except for abuse of discretion or for error of law. Griffith v. Griffith, 265 N.C. 521, 144 S.E.2d 589 (1965).

The amount allowed a wife for her subsistence pendente lite and for her counsel fees is a matter for the trial judge and his discretion in this respect is not reviewable except in case of an abuse of discretion. Miller v. Miller, 270 N.C. 140, 153 S.E.2d 854 (1967).

The amount of subsistence and counsel fees pendente lite to be allowed is within the discretion of the court, and the court's decision is not reviewable except for abuse of discretion or error of law. Brady v. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968).

Discretion Is Not Absolute and Unreviewable.—The allowance of support and counsel fees pendente lite in a suit by wife against husband for divorce or alimony is not an absolute discretion to be exercised at the pleasure of the court and unreviewable, but is to be exercised within certain limits and with respect to factual conditions. Garner v. Garner, 270 N.C. 293, 154 S.E.2d 46 (1967).

The discretion of the court in making allowances pendente lite is not an absolute discretion to be exercised at the pleasure of the court. It is to be exercised within certain limits and with respect to factual conditions which are controlling. Brady v. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968).

The order granting or denying an award of subsistence pendente lite, with or without counsel fees, whether or not containing findings of fact, is not a final determination of and does not affect the final rights of the parties. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

Discretion in making allowances pendente lite is confined to consideration of the necessities of the wife on the one hand, and the means of the husband on the other. Brady v. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968).

Setting Forth Findings of Fact.—An award pendente lite may be made by the judge, and he is not required to set forth in his order any findings of fact where there is no allegation of adultery by the wife, though it is better practice for such findings of fact to be made and set forth in the order. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

Pendente Lite Order Cannot Set Up Savings Account.—A pendente lite order is intended to go no further than provide subsistence and counsel fees pending the litigation. It cannot set up a savings account in favor of the plaintiff. Such is not the purpose and cannot be made the effect of an order. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

§ 50-16.4. Counsel fees in actions for alimony. — At any time that a dependent spouse would be entitled to alimony pendente lite pursuant to G.S. 50-16.3, the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony. (1967, c. 1152, s. 2.)

Cross Reference.—See notes to §§ 50-16.1 and 50-16.3.

Editor's Note.—The cases in the following note were decided under former §§ 50-15 and 50-16, which dealt with alimony pendente lite in divorce actions and subsistence and counsel fees pending actions for alimony without divorce, respectively.

The purpose of the allowance for attorney's fees is to put the wife on substantially even terms with the husband in the litigation. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

The purpose of the allowance of counsel fees pendente lite is to enable the wife, as litigant, to meet the husband, as litigant, on substantially even terms by making it possible for her to employ adequate coun-

sel. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

Subsistence and counsel fees pendente lite are within the discretion of the court, and its decision is not reviewable except for abuse of discretion or for error of law. Griffith v. Griffith, 265 N.C. 521, 144 S.E.2d 589 (1965).

Elements to Be Considered.—There are many elements to be considered in a pendente lite allowance of attorneys' fees for a wife suing for alimony without divorce. The nature and worth of the services, the magnitude of the task imposed, reasonable consideration for the defendant's condition and financial circumstances, and many other considerations are involved. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

§ 50-16.5. Determination of amount of alimony. — (a) Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case.

(b) Except as provided in G.S. 50-16.6 in case of adultery, the fact that the dependent spouse has committed an act or acts which would be grounds for alimony if such spouse were the supporting spouse shall be grounds for disallowance of alimony or reduction in the amount of alimony when pleaded in defense by the supporting spouse. (1871-2, c. 193, ss. 37, 38, 39; 1883, c. 67; Code, ss. 1290, 1291, 1292; Rev., ss. 1565, 1566, 1567; 1919, c. 24; C. S., ss. 1665, 1666, 1667; 1921, c. 123; 1923, c. 52; 1951, c. 893, s. 3; 1953, c. 925; 1955, cc. 814, 1189; 1961, c. 80; 1967, c. 1152, s. 2.)

Cross Reference.—See note to § 50-16.1.

Editor's Note.—The cases in the following note were decided under former § 50-16, which dealt with actions for alimony without divorce.

The purpose of the award is to provide for the reasonable support of the wife, not to punish the husband or to divide his estate. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

Discretion of Judge.—The alimony which a husband was required to pay in proceedings instituted under former § 50-16 was "a reasonable subsistence," the amount of which the judge determined in the exercise of a sound judicial discretion. His order determining that amount would not be disturbed unless there had been an abuse of discretion. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

The amount of alimony to be awarded is in the discretion of the court, but this is not an absolute discretion and unreviewable. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

The amount to be awarded for support pendente lite rests in the sound discretion of the hearing judge, and his determination will not be disturbed in the absence of a clear abuse of that discretion. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

Must Be Exercised with Respect to Controlling Facts.—An order directing the husband to make specified payments for the support of his wife until the birth of their child which expired at the birth of the child without provision for any payments thereafter, although made within the discretion of the court, was vacated and the cause remanded since the court's discretion was not exercised with respect to the controlling factual conditions. Garner v. Garner, 270 N.C. 293, 154 S.E.2d 46 (1967).

One who has no income, but is able-bodied and capable of earning, may be ordered to pay subsistence. Brady v. Brady, 273 N.C. 299, 160 S.E.2d 13 (1968).

The court must consider the estate and earnings of both husband and wife in arriving at the sum which is just and proper for the husband to pay the wife, either as temporary or permanent alimony; it is a question of fairness and justice to both. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

The financial ability of the husband to pay is a major factor in the determination of the amount of subsistence to be awarded. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

Wife's Property Does Not Relieve Husband of Duty to Support Her.—The fact that the wife has property or means of her own does not relieve the husband of his duty to furnish her reasonable support according to his ability. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

The fact that the wife has property of her own does not relieve the husband of the duty to support her following his unjustified abandonment of her. Schloss v.

Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

But the earnings and means of the wife are matters to be considered by the judge in determining the amount of alimony. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

The wife of a wealthy man, who has abandoned her without justification, should be awarded an amount somewhat commensurate with the normal standard of living of a wife of a man of like financial resources. Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968), decided under former § 50-16.

Contributions Only Increasing Wife's Estate for Next of Kin Not Contemplated.—The legislature did not contemplate that "reasonable subsistence," as used in former § 50-16, should include contributions by a husband which tend only to increase an estate for his estranged wife to pass on to her next of kin. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

Alimony Held Excessive.—Alimony payments of $230.00 every four weeks—slightly more than three times the cost of the wife's actual subsistence in a state mental hospital at a cost of $75 a month, even including the cost of guardianship—exceeded "reasonable subsistence." Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

§ 50-16.6. When alimony not payable. — (a) Alimony or alimony pendente lite shall not be payable when adultery is pleaded in bar of demand for alimony or alimony pendente lite, made in an action or cross action, and the issue of adultery is found against the spouse seeking alimony, but this shall not be a bar to reasonable counsel fees.

(b) Alimony, alimony pendente lite, and counsel fees may be barred by an express provision of a valid separation agreement so long as the agreement is performed. (1871-2, c. 193, s. 39; Code, s. 1292; Rev., s. 1567; 1919, c. 24; C. S., s. 1667; 1921, c. 123; 1923, c. 52; 1951, c. 893, s. 3; 1953, c. 925; 1955, cc. 814, 1189; 1967, c. 1152, s. 2.)

Cross Reference.—See note to § 50-16.1.

The jurisdiction of the court is not barred by a prior separation agreement between the parties. Garner v. Garner, 270 N.C. 293, 154 S.E.2d 46 (1967) (decided under former § 50-16).

Experience of Counsel Representing Wife Bears Directly on Attempt to Set Settlement Aside.—The eminence, experience, and character of counsel who represent the plaintiff in procuring a property settlement bear directly on her subsequent attempt to set it aside as fraudulent. Van Every v. Van Every, 265 N.C. 506, 144 S.E.2d 603 (1965) (decided under former § 50-16).

§ 50-16.7. How alimony and alimony pendente lite paid; enforcement of decree.—(a) Alimony or alimony pendente lite shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property or any interest therein, or a security interest in or possession of real property, as the court may order. In every case in which either alimony or alimony pendente lite is allowed and provision is also made for support of minor children, the order shall separately state and identify each allowance.

(b) The court may require the supporting spouse to secure the payment of alimony or alimony pendente lite so ordered by means of a bond, mortgage, or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the supporting spouse to execute an assignment of wages, salary, or other income due or to become due.

(c) If the court requires the transfer of real or personal property or an interest therein as a part of an order for alimony or alimony pendente lite as provided in subsection (a) or for the securing thereof, the court may also enter an order which shall transfer title, as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

(d) The remedy of arrest and bail, as provided in article 34 of chapter 1 of the General Statutes, shall be available in actions for alimony or alimony pendente lite as in other cases.

(e) The remedies of attachment and garnishment, as provided in article 35 of chapter 1 of the General Statutes, shall be available in actions for alimony or ali-

mony pendente lite as in other cases, and for such purposes the dependent spouse shall be deemed a creditor of the supporting spouse.

(f) The remedy of injunction, as provided in article 37 of chapter 1 of the General Statutes and G.S. 1A-1, Rule 65, shall be available in actions for alimony or alimony pendente lite as in other cases.

(g) Receivers, as provided in article 38 of chapter 1 of the General Statutes, may be appointed in actions for alimony or alimony pendente lite as in other cases.

(h) A dependent spouse for whose benefit an order for the payment of alimony or alimony pendente lite has been entered shall be a creditor within the meaning of article 3 of chapter 39 of the General Statutes pertaining to fraudulent conveyances.

(i) A judgment for alimony or alimony pendente lite obtained in an action therefor shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past-due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments.

(j) The wilful disobedience of an order for the payment of alimony or alimony pendente lite shall be punishable as for contempt as provided by G.S. 5-8 and G.S. 5-9.

(k) The remedies provided by chapter 1 of the General Statutes article 28, Execution; article 29B, Execution Sales; and article 31, Supplemental Proceedings, shall be available for the enforcement of judgments for alimony and alimony pendente lite as in other cases, but amounts so payable shall not constitute a debt as to which property is exempt from execution as provided in article 32 of chapter 1 of the General Statutes. "

(l) The specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available. (1967, c. 1152, s. 2; 1969, c. 541, s. 5; c. 895, s. 18.)

Local Modification. — Person: 1967, c. 848, s. 2.

Cross Reference.—See note to § 50-16.1.

Editor's Note.—The first 1969 amendment substituted "of" for "or" between "assignment" and "wages" near the end of subsection (b).

The second 1969 amendment substituted "G.S. 1A-1, Rule 70" for "G.S. 1-227" in subsection (c) and inserted "and G.S. 1A-1, Rule 65" in subsection (f).

Session Laws 1969, c. 895, s. 21, provides: "This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This act takes effect on the same date as chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws Relating to Civil Procedure. In the construction of that act and this act, no significance shall be attached to the fact that this act was enacted at a later date."

Wife Has No Present Right to Disbursement of Eminent Domain Deposit for Land Owned by Entirety. — A wife separated from her husband and seeking alimony pendente lite has no present right to disbursement of money deposited by the State Highway Commission as a credit against just compensation for land owned by the wife and her husband as tenants by entirety. North Carolina State Highway Comm'n v. Myers, 270 N.C. 258, 154 S.E.2d 87 (1967) (decided under former § 50-16).

§ 50-16.8. Procedure in actions for alimony and alimony pendente lite. — (a) The procedure in actions for alimony and actions for alimony pendente lite shall be as in other civil actions except as provided in this section.

(b) Payment of alimony may be ordered:

(1) Upon application of the dependent spouse in an action by such spouse for divorce, either absolute or from bed and board; or

(2) Upon application of the dependent spouse in a separate action instituted for the purpose of securing an order for alimony without divorce; or

(3) Upon application of the dependent spouse as a cross action in a suit for divorce, whether absolute or from bed and board, or a proceeding for alimony without divorce, instituted by the other spouse.

(c) A cross action for divorce, either absolute or from bed and board, shall be allowable in an action for alimony without divorce.

(d) Payment of alimony pendente lite may be ordered:

(1) Upon application of the dependent spouse in an action by such spouse for absolute divorce, divorce from bed and board, annulment, or for alimony without divorce; or

(2) Upon application of the dependent spouse as a cross action in a suit for divorce, whether absolute or from bed and board, annulment, or for alimony without divorce, instituted by the other spouse.

(e) No order for alimony pendente lite shall be made unless the supporting spouse shall have had five days' notice thereof; but if the supporting spouse shall have abandoned the dependent spouse and left the State, or shall be in parts unknown, or is about to remove or dispose of his or her property for the purpose of defeating the claim of the dependent spouse, no notice is necessary.

(f) When an application is made for alimony pendente lite, the parties shall be heard orally, upon affidavit, verified pleading, or other proof, and the judge shall find the facts from the evidence so presented.

(g) When a district court having jurisdiction of the matter shall have been established, application for alimony pendente lite shall be made to such district court, and may be heard without a jury by a judge of said court at any time. Until a district court having jurisdiction shall have been established, application for alimony pendente lite may be made to a resident judge of superior court, a judge regularly holding the superior courts of the district in which the action is brought, any judge holding a session of superior court, either civil or criminal, in the district including the county in which the action is brought or a special judge of superior court residing in the district. Such application in the superior court may be heard in or out of session. If a court other than the superior court has jurisdiction over such application at the time of the application, such jurisdiction shall not be affected by this subsection 50-16.8 (g).

(h) In any case where a claim is made for alimony without divorce, when there is a minor child, the pleading shall set forth the name and age of each such child; and if there be no minor child, the pleading shall so state. (1871-2, c. 193, ss. 37, 38, 39; 1883, c. 67; Code, ss. 1290, 1291, 1292; Rev., ss. 1565, 1566, 1567; 1919, c. 24; C. S., ss. 1665, 1666, 1667; 1921, c. 123; 1923, c. 52; 1951, c. 893, s. 3; 1953, c. 925; 1955, cc. 814, 1189; 1961, c. 80; 1967, c. 1152, s. 2.)

Cross Reference.—See note to § 50-16.1.

Editor's Note.—The cases in the following note were decided under former § 50-16, which dealt with actions for alimony without divorce.

Alimony without Divorce and Alimony Pendente Lite Are Separate Remedies.—Former § 50-16 provided two remedies, one for alimony without divorce, and another for subsistence and counsel fees pending trial and final disposition of the issues involved. Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966); Myers v. Myers, 270 N.C. 263, 154 S.E.2d 84 (1967).

Jury Trial Required for Permanent Alimony But Not Alimony Pendente Lite.—The issuable facts raised by the pleadings in an action for alimony without divorce must be submitted to and passed upon by a jury before a judgment granting permanent alimony may be entered. However, in respect of allowances for alimony and counsel fees pendente lite, "the allowances pendente lite form no part of the ultimate relief sought, do not affect the final rights of the parties, and the power of the judge to make them is constitutionally exercised without the intervention of the jury. Davis v. Davis, 269 N.C. 120, 152 S.E.2d 306 (1967).

Discretion of Judge as to Form of Evidence as to Alimony Pendente Lite.—The words "may be heard in or out of term, orally or upon affidavit, or either or both" informer § 50-16 gave the judge hearing

the motion for alimony pendente lite the discretion to decide in what form he should receive the evidence in his efforts to ascertain the truth. Miller v. Miller, 270 N.C. 140, 153 S.E.2d 854 (1967).

The doctrine of res judicata applies to divorce actions as well as other civil cases. Garner v. Garner, 268 N.C. 664, 151 S.E.2d 553 (1966).

Action for Alimony Based on Abandonment Barred by Verdict in Divorce Action.—The fact that the wife has the alternate remedy of independent action or a cross action to secure alimony without divorce has no effect on the principles of res judicata and does not authorize her to bring an independent action based upon abandonment when the issue of abandonment has theretofore been determined adversely to her by verdict of the jury in the husband's action for divorce on the grounds of separation. Garner v. Garner, 268 N.C. 664, 151 S.E.2d 553 (1966).

§ 50-16.9. **Modification of order.**—(a) An order of a court of this State for alimony or alimony pendente lite, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested. This section shall not apply to orders entered by consent before October 1, 1967.

(b) If a dependent spouse who is receiving alimony under a judgment or order of a court of this State shall remarry, said alimony shall terminate.

(c) When an order for alimony has been entered by a court of another jurisdiction, a court of this State may, upon gaining jurisdiction over the person of both parties in a civil action instituted for that purpose, and upon a showing of changed circumstances, enter a new order for alimony which modifies or supersedes such order for alimony to the extent that it could have been so modified in the jurisdiction where granted. (1871-2, c. 193, ss. 38, 39; 1883, c. 67; Code, ss. 1291, 1292; Rev., ss. 1566, 1567; 1919, c. 24; C. S., ss. 1666, 1667; 1921, c. 123; 1923, c. 52; 1951, c. 893, s. 3; 1953, c. 925; 1955, cc. 814, 1189; 1961, c. 80; 1967, c. 1152, s. 2.)

Cross Reference.—See note to § 50-16.1.

Editor's Note.—The case cited in the following note was decided under former § 50-16, which dealt with actions for alimony without divorce.

Power to Modify Includes Power to Terminate Award.—The power to modify includes, in a proper case, power to terminate the award absolutely. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966); Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

A change in circumstances must be shown in order to modify an order relating to custody, support or alimony. Elmore v. Elmore, 4 N.C. App. 192, 166 S.E.2d 506 (1969).

Any Considerable Change in Health or Financial Condition Warrants Change of Decree.—Any considerable change in the health or financial condition of the parties will warrant an application for change or modification of an alimony decree. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966); Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

But payment of alimony may not be avoided merely because it has become burdensome, or because the husband has remarried and voluntarily assumed additional obligations. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966); Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967).

Increase in Wife's Needs or Decrease in Estate Warrants Increase in Alimony.—An increase in the wife's needs, or a decrease in her separate estate, may warrant an increase in alimony. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

And Decrease in Needs May Be Considered on Motion to Reduce Allowance.—A decrease in the wife's needs is a change in condition which may be properly considered in passing upon a husband's motion to reduce her allowance. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

As May Acquisition of Property or Increase in Its Value.—The fact that the wife has acquired a substantial amount of property, or that her property has increased in value, after entry of a decree for alimony or maintenance, is an important consideration in determining whether and to what extent the decree should be modified. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

Quoted in Dunn v. Dunn, 1 N.C. App. 532, 162 S.E.2d 73 (1968).

§ 50-16.10. Alimony without action.—Alimony without action may be allowed by confession of judgment under article 24, chapter 1, of the General Statutes. (1967, c. 1152, s. 2.)

Cross Reference.—See note to § 50-16.1.

Cited in Richardson v. Richardson, 4 N.C. App. 99, 165 S.E.2d 678 (1969).

Chapter 51.

Marriage.

Article 2.

Marriage Licenses.

ARTICLE 1.

General Provisions.

§ 51-1. Requisites of marriage; solemnization.

Local Modification. — Town of Sparta: 1969, c. 1020.

§ 51-2. Capacity to marry.—(a) All unmarried persons of 18 years, or older, may lawfully marry, except as hereinafter forbidden. In addition, persons over 16 years of age and under 18 years of age may marry, and the register of deeds may issue a license for such marriage, only after there shall have been filed with the register of deeds a written consent to such marriage, said consent having been signed by the appropriate person as follows:

(1) By the father if the male or female child applying to marry resides with his or her father, but not with his or her mother;

(2) By the mother if the male or female child applying to marry resides with his or her mother, but not with his or her father;

(3) By either the mother or father, without preference, if the male or female child applying to marry resides with his or her mother and father;

(4) By a person, agency, or institution having legal custody, standing in loco parentis, or serving as guardian of such male or female child applying to marry.

(b) When an unmarried female who is more than 12 years old, but less than 18 years old, is pregnant or has given birth to a child and such unmarried female and the putative father of the child, either born or unborn, shall agree to marry, and consent in writing to such marriage, as set out is subsection (a), subdivisions (1), (2), (3) or (4) above, or by the director of public welfare of the county of residence of either party, is given on the part of the female the register of deeds is authorized to issue to said parties a license to marry, and it shall be lawful for them to marry in accordance with the provisions of this chapter.

(c) When a license to marry is procured by or on behalf of any person under 18 years of age by fraud or misrepresentation, a parent or person standing in loco parentis to such person under 18 years of age shall be a proper party plaintiff in an action to annul said marriage. (R. C., c. 68, s. 14; 1871-2, c. 193; Code, s. 1809; Rev., s. 2082; C. S., s. 2494; 1923, c. 75; 1933, c. 269, s. 1; 1939, c. 375; 1947, c. 383, s. 2; 1961, c. 186; 1967, c. 957, s. 1.)

Editor's Note.—

The 1967 amendment rewrote the section.

Article 2.

Marriage Licenses.

§ 51-6. Solemnization without license unlawful.—No minister or officer shall perform a ceremony of marriage between any two persons, or shall declare them to be man and wife, until there is delivered to him a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage is intended to take place or by his lawful deputy. There must be at least two witnesses to the marriage ceremony.

Whenever a man and woman have been lawfully married in accordance with the laws of the state in which the marriage ceremony took place, and said marriage was performed by a justice of the peace or some other civil official duly authorized to perform such ceremony, and the parties thereafter wish to confirm their marriage vows before an ordained minister or minister authorized by his church, nothing herein shall be deemed to prohibit such confirmation ceremony; provided, however, that such confirmation ceremony shall not be deemed in law to be a marriage ceremony, such confirmation ceremony shall in no way affect the validity or invalidity of the prior marriage ceremony performed by a civil official, no license for such confirmation ceremony shall be issued by a register of deeds, and no record of such confirmation ceremony may be kept by a register of deeds. (1871-2, c. 193, s. 4; Code, s. 1813; Rev., s. 2086; C. S., s. 2498; 1957, c. 1261; 1959, c. 338; 1967, c. 957, ss. 6, 9.)

Editor's Note. — The 1967 amendment added the last sentence in the first paragraph and added the second paragraph.

§ 51-7. Penalty for solemnizing without license.—Every minister or officer who marries any couple without a license being first delivered to him, as required by law, or after the expiration of such license, or who fails to return such license to the register of deeds within ten days after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and pay two hundred dollars to any person who sues therefor, and he shall also be guilty of a misdemeanor. (R. C., c. 68, ss. 6, 13; 1871-2, c. 193, s. 8; Code, s. 1817; Rev., ss. 2087, 3372; C. S., s. 2499; 1953, c. 638, s. 1; 1967, c. 957, s. 5.)

Editor's Note. — The 1967 amendment substituted "ten" for "thirty" preceding "days" near the middle of the section.

§ 51-8. License issued by register of deeds.—Every register of deeds shall, upon proper application, issue a license for the marriage of any two persons if it appears that such persons are authorized to be married in accordance with the laws of this State. In making a determination as to whether or not the parties are authorized to be married under the laws of this State, the register of deeds may require the applicants for the license to marry to present certified copies of birth certificates or birth registration cards provided for in G.S. 130-73, or such other evidence as the register of deeds deems necessary to such determination. The register of deeds may administer an oath to any person presenting evidence relating to whether or not parties applying for a marriage license are eligible to be married pursuant to the laws of this State. (1871-2, c. 193, s. 5; Code, s. 1814; 1887, c. 331; Rev., s. 2088; C. S., s. 2500; 1957, c. 506, s. 1; 1967, c. 957, s. 2.)

Editor's Note. — The 1967 amendment rewrote the section.

§ 51-8.1: Repealed by Session Laws 1967, c. 53.

§ 51-9. Health certificates required of applicants for licenses.—No license to marry shall be issued by the register of deeds of any county to a male or

female applicant therefor except upon the following conditions: The said applicant shall present to the register of deeds a certificate executed within thirty days from the date of presentation showing that, by the usual methods of examination made by a regularly licensed physician, no evidence of any venereal disease was found. Such certificate shall be accompanied by a report from a laboratory approved by the State Board of Health for making such test showing that a serologic test for syphilis currently approved by the United States Public Health Service was made, such test to have been made within 30 days of the time application for license is made. Before any laboratory shall make such tests or any serologic test required by this section, it shall apply to the North Carolina State Board of Health for a certificate of approval; and such application shall be in writing and shall be accompanied by such reports and information as shall be required by the North Carolina State Board of Health The North Carolina State Board of Health may, in its discretion, revoke or suspend any certificate of approval issued by it for the operation of such a laboratory; and after notice of such revocation or suspension, no such laboratory shall operate as an approved laboratory under this section.

Furthermore, such certificate shall state that, by the usual methods of examination made by a regularly licensed physician, no evidence of tuberculosis in the infectious or communicable stage was found.

And, furthermore, such certificate shall state that, by the usual methods of examination made by a regularly licensed physician, the applicant was found to be mentally competent. (1939, c. 314, s. 1; 1941, c. 218, s. 1; 1945, c. 577, s. 1; 1947, c. 929; 1955, c. 484; 1967, c. 137, s. 1; c. 957, s. 11.)

Editor's Note.— The first 1967 amendment substituted "mentally competent" for "not subject to uncontrolled epileptic attacks, an idiot, an imbecile, a mental defective, or of unsound mind" in the last paragraph. The second 1967 amendment rewrote the second sentence and substituted "serologic" for "serological" in the third sentence.

§ 51-10. Exceptions to § 51-9.

(b) Exceptions to § 51-9, in case of persons who have active tuberculosis, are permissible only under the following conditions:

(1) When the female applicant is pregnant and it is necessary to protect the legitimacy of the offspring, provided that such applicant (and the proposed marital partner if he has active tuberculosis) shows evidence of being under treatment for tuberculosis and both persons are known to the local or county health department and sign agreements to take adequate treatment until cured or protected.

(2) When there is a living child of the parties and it is necessary to protect the legitimacy of said child and either or both of the parties have active tuberculosis, provided that such party or parties with active tuberculosis show evidence of being under treatment for tuberculosis and both parties are known to the local or county health department and sign agreements to take adequate treatment until cured or protected.

(3) To validate any type of marriage which took place prior to the illness of either applicant but which marriage was later found to be invalid because of some technicality and said technicality is not a bar to marriage in North Carolina, provided the marital partner or partners who have active tuberculosis show evidence of being under treatment and sign an agreement to take adequate treatment until cured or protected, and both marital partners are known to the local or county health department. (1939, c. 314, s. 2; 1945, c. 577, s. 2; 1959, c. 351; 1967, c. 957, s. 12.)

Editor's Note. — The 1967 amendment substituted "marital" for "marriageable" in the parenthetical provision in subdivision (1) of subsection (b). As subsection (a) was not affected by the amendment, it is not set out.

§ 51-11. Who may execute certificate; form.—Such certificate, upon the basis of which license to marry is granted, shall be executed by any physician licensed to practice medicine in the State of North Carolina, any other state or territory of the United States, the District of Columbia, or the Commonwealth of Puerto Rico, whose duty it shall be to examine such applicants and to issue such certificate in conformity with the requirements of §§ 51-9 to 51-13. If applicants are unable to pay for such examination, certificate without charge may be obtained from the local health director or county physician.

Such certificate form shall be designed by the State Board of Health and shall be obtained by the register of deeds from the State Board of Health upon request. (1939, c. 314, s. 3; 1957, c. 1357, s. 10; 1967, c. 957, s. 13; 1969, c. 759.)

Editor's Note. — The 1967 amendment deleted the former third paragraph providing for filing a copy of the certificate with the Department of Health.

The 1969 amendment, effective July 1, 1969, rewrote the first sentence.

§ 51-12. Eugenic sterilization for persons adjudged of unsound mind, etc.—If either applicant has been adjudged by a court of competent jurisdiction as being an idiot, imbecile, mental defective, or of unsound mind, unless the applicant previously adjudged of unsound mind has been adjudged of sound mind by a court of competent jurisdiction, upon the recommendation of one or more practicing physicians who specialize in psychiatry, license to marry shall be granted only after eugenic sterilization has been performed on the applicant in accordance with State laws governing eugenic sterilization. (1939, c. 314, s. 3; 1943, c. 641; 1967, c. 137, s. 2.)

Editor's Note.—

The 1967 amendment deleted "subject to epileptic attacks" following "mental defective" near the beginning of the section.

§ 51-14: Repealed by Session Laws 1967, c. 957, s. 3.

§ 51-15. Obtaining license by false representation misdemeanor.—If any person shall obtain a marriage license by misrepresentation or false pretenses, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days, or both, at the discretion of the court. (1885, c. 346; Rev., s. 3371; C.S., s. 2501; 1967, c. 957, s. 4.)

Editor's Note. — The 1967 amendment struck out "for the marriage of persons under the age of eighteen years" following "license."

§ 51-16. Form of license.—License shall be in the following or some equivalent form:

To any ordained minister of any religious denomination, minister authorized by his church, or to any justice of the peace for ..... county: A. B. having applied to me for a license for the marriage of C. D. (the name of the man to be written in full) of (here state his residence), aged ..... years (race, as the case may be), the son of (here state the father and mother, if known; state whether they are living or dead, and their residence, if known; if any of these facts are not known, so state), and E. F. (write the name of the woman in full) of (here state her residence), aged ..... years (race, as the case may be), the daughter of (here state names and residences of the parents, if known, as is required above with respect to the man). (If either of the parties is under eighteen years of age, the license shall here contain the following:) And the written consent of G. H., father (or mother, etc., as the case may be) to the proposed marriage having been filed with me, and there being no legal impediment to such marriage known to me, you are hereby authorized, at any time within sixty days from the date hereof, to celebrate the proposed marriage at any place within the

said county. You are required, within thirty days after you shall have celebrated such marriage, to return this license to me at my office with your signature subscribed to the certificate under this license, and with the blanks therein filled according to the facts, under penalty of forfeiting two hundred dollars to the use of any person who shall sue for the same.

Issued this ..... day of ....., 19..

..... L. M.,
Register of Deeds of ..... County

Every register of deeds shall designate in every marriage license issued the race of the persons proposing to marry by inserting in the blank after the word "race" the words "white," "colored," or "Indian," as the case may be. The certificate shall be filled up and signed by the minister or officer celebrating the marriage, and also be signed by two witnesses present at the marriage, who shall add to their names their place of residence, as follows:

I, N. O., an ordained or authorized minister of (here state to what religious denomination, or justice of the peace, as the case may be), united in matrimony (here name the parties), the parties licensed above, on the .... day of ....., 19.., at the house of P. R., in (here name the town, if any, the township and county), according to law.

..... N. O.

Witness present at the marriage:

S. T., of (here give residence).

(1871-2, c. 193, s. 6; Code, s. 1815; 1899, c. 541, ss. 1, 2; Rev., s. 2089; 1909, c. 704, s. 3; 1917, c. 38; C. S., s. 2502; 1953, c. 638, s. 2; 1967, c. 957, s. 7.)

Editor's Note. — The 1967 amendment substituted "two" for "one or more" preceding "witnesses" in the second sentence of the paragraph following the form.

§ 51-18. Record of licenses and returns; originals filed.—Every register of deeds shall keep a book (which shall be furnished on demand by the board of county commissioners of his county) on the first page of which shall be written or printed:

Record of marriage licenses and of returns thereto, for the county of ....., from the ..... day of ....., 19.., to the ..... day of ....., 19.., both inclusive.

In said book shall be entered alphabetically, according to the names of the proposed husbands, the substance of each marriage license and the return thereupon, as follows: The book shall be divided by lines with columns which shall be properly headed, and in the first of these, beginning on the left, shall be put the date of issue of the license; in the second, the name in full of the intended husband with his residence; in the third, his age; in the fourth, his race and color; in the fifth, the name in full of the intended wife, with her residence; in the sixth, her age; in the seventh, her race and color; in the eighth, the name and title of the minister or officer who celebrated the marriage; in the ninth, the day of the celebration; in the tenth, the place of the celebration; in the eleventh, the names of two witnesses who signed the return as present at the celebration. The original license and return thereto shall be filed and preserved. (1871-2, c. 193, s. 9; Code, s. 1818; 1899, c. 541, s. 3; Rev., s. 2091; C. S., s. 2504; 1963, c. 429; 1967, c. 957, s. 8.)

Editor's Note.— The 1967 amendment substituted "two" for "all or at least two of the" preceding "witnesses" near the end of the section.

§ 51-20: Repealed by Session Laws 1969, c. 80, s. 6, effective July 1, 1969.

§ 51-21. Issuance of delayed marriage certificates.—In all those cases where a minister or other person authorized by law to perform marriage cere-

monies has failed to file his return thereof in the office of the register of deeds who issued the license for such marriage, the register of deeds of such county is authorized to issue a delayed marriage certificate upon being furnished with one or more of the following:

(1) The affidavit of at least two witnesses to the marriage ceremony;

(2) The affidavit of one or both parties to the marriage, accompanied by the affidavit of at least one witness to the marriage ceremony;

(3) The affidavit of the minister or other person authorized by law who performed the marriage ceremony, accompanied by the affidavit of one or more witnesses to the ceremony or one of the parties thereto.

(4) When proof as required by the three methods set forth in subdivisions (1), (2), and (3) above is not available with respect to any marriage alleged to have been performed prior to January 1, 1935, the register of deeds is authorized to accept the affidavit of any one of the persons named in subdivisions (1), (2), and (3) and in addition thereto such other proof in writing as he may deem sufficient to establish the marriage and any facts relating thereto; provided, however, that if the evidence offered under this paragraph is insufficient to convince the register of deeds that the marriage ceremony took place, or any of the pertinent facts relating thereto, the applicants may bring a special proceeding before the clerk of superior court of the county in which the purported marriage ceremony took place. The said clerk of the superior court is authorized to hear the evidence and make findings as to whether or not the purported ceremony took place and as to any pertinent facts relating thereto. If the clerk finds that the marriage did take place as alleged, he is to certify such findings to the register of deeds who is to then issue a delayed marriage certificate in accordance with the provisions of this section.

The certificate issued by the register of deeds under authority of this section shall contain the date of the delayed filing, the date the marriage ceremony was actually performed, and all such certificates issued pursuant to this section shall have the same evidentiary value as any other marriage certificates issued pursuant to law. (1951, c. 1224; 1955, c. 246; 1967, c. 957, s. 10; 1969, c. 80, s. 12.)

Editor's Note. — The 1967 amendment added the language following the semicolon in subdivision (4).

The 1969 amendment, effective July 1, 1969, eliminated the former last paragraph, providing for a fee of $1.50 for each certificate.

Chapter 52.

Powers and Liabilities of Married Persons.

Sec.

52-5.1. Tort actions between husband and wife arising out of acts occurring outside State.

§ 52-2. Capacity to contract.

I. IN GENERAL.

Cited in United States v. Yazell, 382 U.S. 341, 86 Sup. Ct. 500, 15 L. Ed. 2d 404 (1966).

§ 52-4. Earnings and damages.

Spouses May Sue Each Other.— In accord with 3rd paragraph in original. See First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

§ 52-5. Torts between husband and wife.

The legislature by statute, etc.—

In accord with original. See Ayers v. Ayers, 269 N.C. 443, 152 S.E.2d 468 (1967).

A wife may maintain an action against her husband for assault and battery. Ayers v. Ayers, 269 N.C. 443, 152 S.E.2d 468 (1967).

Or for Personal Injuries from His Negligence.—In this jurisdiction a wife has the right to sue her husband and recover damages for personal injuries inflicted by his actionable negligence. First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

And Wrongful Death Action, etc.—

In accord with original. See First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

§ 52-5.1. Tort actions between husband and wife arising out of acts occurring outside State.—A husband and wife shall have a cause of action against each other to recover damages for personal injury, property damage or wrongful death arising out of acts occurring outside of North Carolina, and such action may be brought in this State when both were domiciled in North Carolina at the time of such acts. (1967, c. 855.)

Editor's Note.—For article on "Conflict of Spousal Immunity Laws: The Legislature Takes a Hand," discussing this section, see 46 N.C.L. Rev. 506 (1968).

For note on "greatest interest rule" as a choice-of-law conflicts rule, see 47 N.C.L. Rev. 407 (1969).

§ 52-6. Contracts of wife with husband affecting corpus or income of estate; authority, duties and qualifications of certifying officer; certain conveyances by married women of their separate property.

(c) Such certifying officer must be a justice, judge, magistrate, clerk, assistant clerk, or deputy clerk of the General Court of Justice, or judge of a court inferior to the superior court, or justice of the peace or the equivalent or corresponding officers of the state, territory, or foreign country where the acknowledgment and examination is made.

(1969, c. 44, s. 54.)

I. IN GENERAL.

Editor's Note.—

The 1969 amendment rewrote subsection (c).

As the rest of the section was not changed by the amendment, only subsection (c) is set out.

For article on "Doubt Reduction Through Conveyancing Reform — More Suggestions in the Quest for Clear Land Titles," see 46 N.C.L. Rev. 284 (1968).

For article, "Toward Greater Marketability of Land Titles—Remedying the Defective Acknowledgment Syndrome," see 46 N.C.L. Rev. 56 (1967).

Davis v. Davis, 269 N.C. 120, 152 S.E.2d 306 (1967), cited in the note below, was commented on in 45 N.C.L. Rev. 850 (1967).

Common Law.—All transactions of the wife with her husband in regard to her separate property were held void at common law. Trammell v. Trammell, 2 N.C. App. 166, 162 S.E.2d 605 (1968).

Strict Compliance.—Since a married woman's power to convey is wholly statutory, all the requirements of enabling statutes must be strictly complied with to render her deed valid, and her deed will be held invalid where there is a failure to comply with statutory requirements as to execution or acknowledgment. Where, however, there has been a substantial compliance with statutory requirements, her deed may be enforced, but there must be a substantial compliance with every requisite of the statute. Trammell v. Trammell, 2 N.C. App. 166, 162 S.E.2d 605 (1968).

A wife cannot convey her real property to her husband, either directly or indirectly, without complying with the privy examination provisions of this section which requires the certifying officer who examines the wife to incorporate in his certificate a finding that the transaction is not unreasonable or injurious to her. Combs v. Combs, 273 N.C. 462, 160 S.E.2d 308 (1968).

This section is an enabling statute. Trammell v. Trammell, 2 N.C. App. 166, 162 S.E.2d 605 (1968).

Separation agreements must be executed in conformity with statutory requirements governing contracts between husband and wife. Trammell v. Trammell, 2 N.C. App. 166, 162 S.E.2d 605 (1968).

A contract between husband and wife, which must be executed in the manner and

form required by this section, is void ab initio if the statutory requirements are not observed. Trammell v. Trammell, 2 N.C. App. 166, 162 S.E.2d 605 (1968).

But for this section the deed of a wife conveying land to her husband would be void. Such deed is valid only when this section has been strictly complied with. Trammell v. Trammell, 2 N.C. App. 166, 162 S.E.2d 605 (1968).

When Wife's Deed Void.—The deed of a wife, conveying land to her husband, is void unless the probating officer in his certificate of probate certify that, at the time of its execution and her privy examination, the deed is not unreasonable or injurious to her. Trammell v. Trammell, 2 N.C. App. 166, 162 S.E.2d 605 (1968).

The law requires the certifying officer to conduct an examination and to determine the contract was duly executed, and to certify that it is not unreasonable or injurious. Tripp v. Tripp, 266 N.C. 378, 146 S.E.2d 507 (1966).

A contract may be set aside if induced by fraud. Van Every v. Van Every, 265 N.C. 506, 144 S.E.2d 603 (1965).

If Plaintiff Alleges Facts Supporting Inference It Was Induced by Fraudulent Misrepresentations.—The plaintiff, however, must allege facts which, if found to be true, permit the legitimate inference that the defendant induced the plaintiff by fraudulent misrepresentations to enter into the contract which but for the misrepresentations she would not have done. Van Every v. Van Every, 265 N.C. 506, 144 S.E.2d 603 (1965).

But Efforts to Set Aside Contract Made in Good Faith Are Not Favored. — When the contract is made in good faith, is executed according to the requirements, and performed on one side, the Supreme Court does not look with favor on efforts to set it aside except upon valid legal grounds. Tripp v. Tripp, 266 N.C. 378, 146 S.E.2d 507 (1966).

And a valid separation agreement cannot be set aside or ignored without the consent of both parties. The intent of the parties as expressed in such an agreement is controlling. Van Every v. Van Every, 265 N.C. 506, 144 S.E.2d 603 (1965).

Applied in Mitchell v. Mitchell, 270 N.C. 253, 154 S.E.2d 71 (1967).

Cited in Ayers v. Ayers, 269 N.C. 443, 152 S.E.2d 468 (1967); Terrell v. Terrell, 271 N.C. 95, 155 S.E.2d 511 (1967).

II. TRANSACTIONS INCLUDED.

Separation agreements, etc.—

In accord with 2nd paragraph in original. See Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

A separation agreement in which fair and reasonable provision is made for the wife will be upheld when executed by her in the manner provided by this section. Van Every v. Van Every, 265 N.C. 506, 144 S.E.2d 603 (1965).

Separation agreements between husbands and wives are not contrary to the public policy of this State provided they are not unreasonable or injurious to the wife, and therefore a separation agreement executed in accordance with the laws of the state of the residence of the parties will not be held invalid in this State because of the failure to observe North Carolina statutory requirements in the execution of such an agreement, but it may be attacked in this State if the wife alleges and establishes that the agreement, having due regard to the condition and circumstances of the parties at the time it was made, was unreasonable or injurious to the wife, the matter to be determined by the court as a question of fact, with the burden of proof upon the party attacking the validity of the agreement. Davis v. Davis, 269 N.C. 120, 152 S.E.2d 306 (1967).

III. THE CERTIFICATE.

The certificate is conclusive except for fraud. Tripp v. Tripp, 266 N.C. 378, 146 S.E.2d 507 (1966).

Allegation Held Insufficient to Impeach Certificate.—The allegation, "The plaintiff was advised that a paper purporting to be a property settlement did not constitute a permanent settlement because the defendant would return, resume a marriage relations, and the money received would be tantamount to a gift," is an insufficient allegation on which to impeach the clerk's certificate required by this section. Van Every v. Van Every, 265 N.C. 506, 144 S.E.2d 603 (1965).

IV. EFFECT OF NONCOMPLIANCE.

A separation agreement, etc.—

Under the statute then codified as § 52-12 and the decisions of the Supreme Court, a separation agreement entered into in September, 1962, was void ab initio unless it complied with these statutory requirements: That "such contract (be) in writing, and . . . duly proven as is required for the conveyances of land; and (that) such examining or certifying officer shall incorporate in his certificate a statement of his conclusions and findings of fact as to whether or not said contract is unreasonable or injurious" to the wife. Davis v. Davis, 269 N.C. 120, 152 S.E.2d 306 (1967).

§ 52-8. Validation of contracts between husband and wife where wife is not privately examined.—Any contract between husband and wife coming within the provisions of G.S. 52-6 executed between January 1, 1930, and June 20, 1963, which does not comply with the requirement of a private examination of the wife and which is in all other respects regular is hereby validated and confirmed to the same extent as if the examination of the wife had been separate and apart from the husband. This section shall not affect pending litigation. (1957, c. 1178; 1959, c. 1306; 1965, c. 207; c. 878, s. 1; 1967, c. 1183, s. 1.)

Editor's Note.—

The 1967 amendment substituted "January 1, 1930" for "October 1, 1954" near the beginning of the section. Section 2½ of the amendatory act provides that it shall not apply to pending litigation. The act was ratified July 6, 1967, and became effective upon ratification.

§ 52-10. Contracts between husband and wife generally; releases.

Section Inapplicable to Right of Wife, etc.—

In accord with original. See Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

To be valid a separation agreement must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Attack on Deed of Separation.—A married woman may attack the certificate of her acknowledgment and privy examination respecting her execution of a deed of separation, inter alia, upon the grounds of her mental incapacity, infancy, or the fraud of the grantee. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Until deed of separation is rescinded, defendant cannot attack the legality of separation or obtain alimony from plaintiff. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

§ 52-10.1. Separation agreements; execution by minors.

To be valid a separaion agreement must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Attack on Deed of Separation.—A married woman may attack the certificate of her acknowledgment and privy examination respecting her execution of a deed of separation, inter alia, upon the grounds of her mental incapacity, infancy, or the fraud of the grantee. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

Until deed of separation is rescinded, defendant cannot attack the legality of the separation or obtain alimony from plaintiff. Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968).

§ 52-11. Antenuptial contracts and torts.

Editor's Note.—

For case law survey on tort law, see 43 N.C.L. Rev. 906 (1965).

Chapter 52A.

Uniform Reciprocal Enforcement of Support Act.

§ 52A-10.2. Complaint by minor.

Opinions of Attorney General. — Mr. W.H.S. Burgwyn, Jr., Solicitor, 8/20/69.

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

October 24, 1969

I, Robert Morgan, Attorney General of North Carolina, do hereby certify that the foregoing 1969 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

Robert Morgan
Attorney General of North Carolina